APPENDIX B

B–59485

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, November 7, 1949.

The Honorable The ATTORNEY GENERAL.

Re: *Alcoa Steamship Company, Inc. v. United States.* Before the United States Supreme Court, No. 271–This Term.

MY DEAR Mr. ATTORNEY GENERAL: I have your letter of October 26, 1949, file HGM: SDS, as follows:

> The abovecaptioned case, presently being prepared for argument in the Supreme Court during the November sitting, involves a claim by the Steamship Company that ocean freight may be collected by it from the United States under a Government standard form bill of lading, without regard to the fact that the shipment involved was lost by reason of the destruction of the ship through enemy action. We are, of course, contending that, under the Government bill of lading, freight is not earned nor payable unless the goods covered by the bill of lading are delivered and the necessary documents properly accomplished. It is our understanding that the case is a test case, typical of a great many claims now pending before your office, certain of which have already advanced to the stage of litigation.

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We would greatly appreciate a statement of your views on the question involved and request that a report, embodying those views, be prepared by your office. We are particularly interested in establishing the administrative practice, both with regard to the interpretation and application of the Government standard form bill of lading and with regard to the requirement of R. S. 3648, in connection with the Government's liability to pay transportation charges prior to delivery. The petitioning Steamship Company, as well as steamship companies which have filed statements *amicus curiae* in the abovecaptioned case, have asserted that it has been the uniform practice of the Government to consider that the obligation to pay freight charges was fixed at the point of receipt of the goods by the carrier rather than by delivery of the goods to the consignee; and that this uniform practice has only been varied during the recent war. These assertions do not accord with our understanding of the Government's consistent position and, since the matter has been placed squarely in issue, we are anxious to establish the correct administrative background.

We would appreciate the receipt of a report as soon as possible. I emphasize the urgency of the matter in as much as the Supreme Court set the case down for immediate briefing and argument upon granting the writ of certiorari.

Pursuant to your request I have caused a search to be made of the available copies of decisions of the accounting officers of the United States for the past 100 years, and there are attached copies of various decisions and letters, identified as enclosures by number, which reflect,

as nearly as such search could determine, the conclusions of said officials on the general question here involved. While, in view of the necessity for dispatch with which this search has been conducted, it cannot be stated unequivocally that all decisions upon the question have been consulted or that none has escaped examination, an effort at thoroughness has been maintained and the results show on the whole a continuing steadfastness on the part of said officials in their adherence generally to the proposition that freight is not earned until delivery of the shipment to the consignee or destination is effected.

The decisions of the Second Comptroller of the Treasury (Enclosures 1 to 18), rendered prior to 1894, at which time the Office of Comptroller of the Treasury was established under the Dockery Act of July 31, 1894, 28 Stat. 205, do not generally indicate the specific conditions of the contracts of affreightment involved, with respect to the fixing of liability for prepayment or subsequent payment of freight charges in the event the vessel or goods should be lost. Frequently, the contract of carriage is referred to as a charter-party, while in other cases the term "Bill of Lading" is employed, and in still other cases an agreement is mentioned without further description of the contract terms. In each case, however, it was held that the Government was not liable for the freight charges on goods not delivered to the destination agreed upon regardless of the cause thereof. As early as August 13, 1842, in a circular directed to Navy Agents, Second Comptroller Albion K. Parris specified that "All accounts for freight must be accompanied by bills of lading,

and proof of delivery to the consignee, viz: his receipt for the articles delivered." In communications of September 21, 1843, May 18, 1846, December 29, 1846, March 1, 1847, July 10, 1847, November 3, 1847, February 9, 1848, May 3, 1848, and November 17, 1849, said official considered claims for freight in instances in which the contracts of carriage were not completed. While pro rata freight was allowed in some instances on voyages abandoned short of destination in no instance was there an authorization to pay freight on property not delivered to the consignee or at destination. See enclosures 2 to 10, inclusive.

During the period 1855 to 1870 Second Comptroller J. M. Brodhead had occasion in seven instances to express a like conclusion. See enclosures 11 to 17, inclusive. In the letter dated July 8, 1865, (Enclosure No. 16), which involved the Barque "Whistling Wind," the United States had agreed to pay the owner at the rate of $9.50 per ton for transporting 450 tons of coal from New York to New Orleans. Enroute the vessel was capturd "by a rebel privateer." In denying liability of the Government for the freight claimed, Comptroller Brodhead said: "The authorities are all agreed that when the loss of the vessel is occasioned by perils of the seas, fire, enemies, pirates, etc., there is also a loss of freight," citing, "Phillips, insurance, Vol. 2, p. 353, 354, Parsons, War Law, Vol. 2, p. 385, 391," and stating that "This principle is also laid down in the case of *Blanchard* v. *Buchman*, 3 Greenleaf 1." The claim for freight was held, accordingly, properly disallowed. A similar holding was made by Second Comptroller Parris

(Enclosure No. 9) concerning the *Bark Rothschild*. There the vessel encountered a storm during a passage from New Orleans to Vera Cruz, Mexico, during October, 1847, and fifty-two public horses died at sea, thirty-one of them being washed or thrown overboard. In holding that no freight could be paid on the thirty-one horses lost, the Comptroller said:

> The law upon this point is well settled, in proof of which I might refer to many authorities. I will merely mention the case of Griggs vs Austin, 3 Pickering's (Massachusetts) Reports, p. 20, where goods shipped at Boston for Liverpool were lost, by the perils of the sea, within six miles of the latter port. The court decided that the freight having been paid in advance, might be recovered back by the shipper. That case was argued by eminent counsel, and the opinion of the court reviews the authorities and puts the question at rest.

In a decision of February 14, 1863, herewith, enclosure No. 18, Second Comptroller Madison Cutts expressed a like necessity for delivery before payment of transportation charges could be considered as authorized. Likewise on June 27, 1893, upon request of the Secretary of War for advice as to whether vouchers would have to be supported by bills for transportation service performed under public tariffs, Second Comptroller C. H. Mansur stated, enclosure No. 19:

> My decision upon the third question is that the vouchers referred to in said decision which are filed in support of payments for transportation service performed under public tariffs, need not be accompanied by

> bills, in cases where duly accomplished bills of lading or transportation requests, as the case may be, are filed with the vouchers to which they pertain * * *.

The decisions of the Comptroller of the Treasury, rendered subsequent to the establishment of the Office of the Comptroller of the Treasury by the Dockery Act of July 31, 1894, 28 Stat. 205, have, in the main, adhered to the rule followed by the Second Comptroller of the Treasury that the Government will in no event make prepayment of freight charges and is not liable for the payment of freight charges on goods not delivered at the destination agreed upon. See 3 Comp. Dec. 181; 3 *id.* 221; 4 *id.* 544; 7 *id.* 262; 9 *id.* 332; 12 *id.* 746; and letters of March 6, 1901 December 12, 1902, October 29, 1909, and September 23, 1915 (enclosures 20 to 23, inclusive). The decision in 3 Comp. Dec. 181, while stating the general rule referred to above, did sanction the relief of a disbursing officer for charges prepaid on a shipment from Boston to Genoa, Italy, upon a showing that he had been compelled, improperly, to prepay the charges in order to procure the service, but it was stated, notwithstanding the credit given in the disbursing officer's account, that "the United States might have a claim against the carrier for freight advanced in case of failure to deliver." This decision, insofar as it appeared to sanction the prepayment of freight charges in a situation such as there involved, was repudiated shortly thereafter in 4 Comp. Dec. 544 and in the letter of March 6, 1901 (enclosure 20), emphasis being placed in both of the latter decisions upon the inexorable requirements of

section 3648 of the Revised Statutes of the United States. The result reached in the decision in 12 Comp. Dec. 746 was modified in Appeal No. 12863, dated October 31, 1906 (enclosure 24), upon a showing that the loss resulted from a cause under which the carrier was exempt from liability for the value of the goods. In authorizing refund of the entire amount claimed by the carrier upon appeal, because of the showing of peril of the sea, no mention was made of any modification of the previously expressed view as to the operation of section 3648 of the Revised Statutes upon any claim for unearned freight charges, and the conclusion seems justified that, in authorizing refund of the lump sum claimed by the carrier, the fact that freight charges on the lost property was included in said sum was overlooked. In the decision in 12 Comp. Dec. 746, it was said:

> The freight was not prepaid, and a contract to prepay it at New York and to become liable therefor, whether earned or unearned, would be in violation of section 3648 of the Revised Statutes, which provides:
>
> "No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States payment shall not exceed the value of the service rendered or of the articles delivered previous to such payment."
>
> Under this statute and the facts in this case the contract must therefore be construed as an ordinary contract to carry and safely deliver the goods in question and to pay the freight on delivery. Without

delivery the freight is not earned. (*De Sola* v. *Pomares,* 119 Fed. Rep. 373; *Hagar, et al.* v. *Donaldson et al.,* 154 Pa., 242.)

The amount disallowed by the letter of September 23, 1915 (enclosure 23), was authorized for payment in the letter of January 8, 1916 (enclosure 25), upon a showing by the carrier that the shipment was delivered at the Mexican port of destination in accordance with the law of Mexico.

In the above cited decisions the Comptroller of the Treasury seems to have held consistently, with the exception of the one instance reported in 3 Comp. Dec. 181, that the prepayment of freight charges or payment of such charges without delivery of the freight was prohibited, putting emphasis in that connection upon section 3648 of the Revised Statutes in 3 Comp. Dec. 221, 4 *id.* 544, 12 *id.* 746 and enclosure 20. The circumstances involved in the case covered by the letter of October 29, 1909, enclosure 22), do not appear to involve a departure from this rule, inasmuch as the shipper, a vendor to the Government, in order to comply with the request for the shipment of potatoes and onions from New Orleans, Louisiana, to the U. S. S. *Dubuque* at Puerto Cortez, Honduras, prepaid the freight charges from his own funds and, while subsequently reimbursed therefor by the United States, the latter recovered the freight charges by deducting the amount thereof from a subsequent bill of the carrier. In 9 Comp. Dec. 332, said official held, with respect to a shipment delivered short of the port of destination, that since was due and payment *pro rata itineris* was

the acceptance of the cargo at a point short of the destination named in the contract of affreightment was under compulsion, no freight whatever denied.

The emphasis placed by the Comptroller of the Treasury upon the provisions of section 3648 of the Revised Statutes seems probably to have resulted from the fact that apparently in the latter part of the 19th or the early part of the 20th century, the carriers of goods by sea were urging that effect be given certain clauses inserted in their bill of lading forms purporting to require the prepayment of the freight charges, with the provision that such charges were to be deemed earned and payable upon delivery of the cargo to the vessel, and were to be retained by the vessel, ship or goods lost or not lost, whether the voyage should be completed or not.

In this connection it is to be noted that the Comptroller of the Treasury, by Departmental Circular No. 62, dated October 29, 1907 (14 Comp. Dec. 967), prescribed, among other forms, the standard Government bill of lading form for use in connection with the transportation of property on which the Government should be liable for the payment of freight charges. The Government bill of lading form so authorized, under the captions "CONDITIONS" and "INSTRUCTIONS," provided, in pertinent part, as follows:

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of freight charges will in no case be demanded by carriers. Upon

surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

* * * * *

INSTRUCTIONS

1. Government property will be transported on the prescribed form of *Government Bill of Lading,* which will be identified by serial numbers.

* * * * *

8. *Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made* * * *.

* * * * *

13. In case of loss or damage to property while in the possession of the carrier, such loss or damage should, when practicable, be noted on the bill of lading before its accomplishment. All practicable steps should be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer all evidence as to the same.

The conditions and instructions quoted above clearly provide for the rendition of service and the payment of charges therefor in a manner entirely consistent with the provisions of section 3648 of the Revised Statutes.

The Government bill of lading form referred to above was revised on June 19, 1915, by "Department Circular No. 49, 1915," issued by the Comptroller of the Treasury. See "Digest of Decisions of the Comptroller of the Treasury 1894–1920," at page 2489. A copy of the revised bill of lading form is attached as enclosure No. 26. The revised form made no particular change in the "CONDITIONS," except to add that no collection should be made from the consignee, and to drop the reference to railway and express transportation and provide in lieu thereof that "Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." The instructions shown in the original form as Nos. 1, 8, and 13 are shown in the revised form as Nos. 2 and 6.

The standard Government bill of lading form was again revised by General Regulations No. 69, dated August 24, 1928, issued by the Comptroller General of the United States (8 Comp. Gen. 695), and at another time by General Regulations No. 97, issued by this Office on April 13, 1943 (22 Comp. Gen. 1172). However, the conditions and instructions contained in the succeeding revisions remained substantially the same as those embodied in the 1915 form.

The decision of November 11, 1896 (3 Comp. Dec. 181), operated merely to afford relief to a disbursing officer in prepaying freight charges, because of the particular circumstances there involved. From that time onward, or at least from the dates the conclusion reached therein was repudiated by the decisions of March 29, 1898 (4 Comp. Dec. 544), and March 6, 1901 (enclosure 20), the Comptroller of the Treasury seems to have remained inflexible in his refusal to permit the prepayment of freight charges under any circumstances. With respect to the payment of freight on shipments, or any portion thereof, not delivered at destination, no decision prior to that of May 27, 1918 (24 Comp. Dec. 707), has been found in which the Comptroller of the Treasury expressly sanctioned such payment, the inclusion of freight charges in the refund authorized in the decision of October 31, 1906 (enclosure 24), being due apparently to oversight, only the repayment of the value of the property being intended.

The decision of May 27, 1918 (24 Comp. Dec. 707), involved a claim supported by 2 original and 22 copies of Government bills of landing covering shipments by sea, no accomplished bills of lading or other evidence of delivery being submitted in connection with 22 of the shipments. The two original bills of lading bore the rubber stamp notations "Not responsible for condition or contents on delivery" and "Freight prepaid," and the Comptroller of the Treasury was asked whether the freight charges might be paid, reference being made to an alleged commercial practice whereby the freight charges usually are prepaid or, if collectible only after delivery, to the

practice of insuring such charges. The decision stated that—

> Ordinarily payment of transportation charges can only be made upon proof of delivery of the property to the consignee at point designated in the bill of lading, and the transportation company is liable for any loss or damage.

Thus, it seems to have been recognized that the contract of affreightment, represented by the Government bill of lading, precluded the prepayment of freight charges and made proof of the delivery of the shipment a condition precedent to the payment of the freight charges thereon. However, the Comptroller of the Treasury made reference to the fact that the freight [charge] was not insured by the Government and it apparently was through consideration of the fact that the carrier could not look to insurance for collection of any charges that the Comptroller of the Treasury stated:

> The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel.

In other words the Government, and no other party, was to be liable for the payment of proper charges. In arriving at what those proper charges might be the provisions of section 3648 of the Revised Statutes were expressly referred to as being applicable and in that connection it was said:

> * * * Under the circumstances outlined in this case the service required to be

performed and for which payment may be made is the delivery of the property to the consignee or an excusable failure to make such delivery, evidence of one or the other of which should be furnished.

What was to be regarded as constituting "excusable failure" to make "delivery of the property to the consignee" was not disclosed in the decision. Neither was there any indication of the basis for determining the amount of any payable charges in event of such "excusable failure." In this connection it is to be noted that the submission from the Navy Department disbursing officer contained the unqualified statement that "The shipments are made subject to all clauses and conditions of bills of lading in use by steamship lines" and this seems consistent with the stamped notations thereon as noted above. The case, therefore, does not appear to establish any determination that payment of charges becomes due upon delivery to carriers for transportation under a Government bill of lading without the performance of service thereunder or that in making payment for service rendered under such a bill of lading the requirements of section 3648 are rendered inapplicable. On the contrary the decision expressly required proof of delivery or "excusable failure." If the decision be given effect as holding that full charges to destination are earned on shipments that do not reach destination, the effect so given would seem clearly inconsistent with the fact that the service contracted for was not in fact rendered and payment of such charges in those circumstances would seem clearly in excess of "the value of the service rendered."

Turning now to decisions rendered in the period subsequent to June 30, 1921, covered by the Budget and Accounting Act, 1921, it is found that in 4 Comp. Gen. 562, decided December 24, 1924, charges were found properly due only as to that portion of a shipment "actually delivered" to the consignee at destination and that charges were not properly payable on that portion of the shipment transferred from steamer to lighter at the destination port but not delivered to consignee due to sinking of the lighter in a storm. The shipment moved on a Government bill of lading. Likewise in 7 Comp. Gen. 86, decided August 1, 1927, there was involved a deduction made from a bill of the United Fruit Company for the value of an article found short on delivery and the value of an article found to have been broken in transit and "freight on the two articles." The carrier's claim for the amount deducted was disallowed in the General Accounting Office and the cited decision sustained the settlement of disallowance. In 10 Comp. Gen. 447, decided April 2, 1931, there was involved a deduction of $53.31, comprising $39.78 as the value of materials lost in transit on a shipment via Norton Lilly & Co., and $13.53 as the freight charges claimed on the lost supplies. This shipment moved on a Government bill of lading and although the charges are mentioned parenthetically in said decision as "prepaid," examination of the original payment record shows that the shipment of which the lost articles were a part was delivered at destination in April 1928, whereas the disbursing officer made payment of the transportation charges claimed on the shipment, less the deduction for unearned freight, in

August 1928. The same principle was applied by Assistant Comptroller General Lurtin R. Ginn in a decision of September 9, 1930, in A–33315, enclosure No. 27. On July 31, 1934, in file A–56905, the then Assistant Comptroller General, R. N. Elliott, issued instructions, enclosure No. 28, to the Claims Division of the General Accounting Office to disallow freight charges on articles destroyed in transit, making specific reference in that connection to the terms of the Government bill of lading as clearly contemplating that payment of freight charges was not to be made until the shipment was delivered at destination. In A–63681, October 17, 1935, enclosure No. 29, a like conclusion was reached upon a claim of the Munson Steamship Line.

For a decision in which the requirements of the Government bill of lading, as compared with the provisions of commercial bills of lading, were considered at length, attention is invited to decisions of May 9, 1940, and May 20, 1940, enclosures No. 30 and 31, in A–97190, involving claims of the Norfolk and Washington, D. C. Steamboat Company and the Richmond Fredericksburg & Potomac Railroad Company, respectively. The occasion of the claims there involved was the standing of a vessel of the McCormick Steamship Company on the coast of California. In said decisions it was stated:

> In the instant matter the original agreement, as expressed in the Government bill of lading, required, no less than did the original agreement in the case just noted [*Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. (2d) 740], delivery before pay-

> ment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

The shipments involved in these decisions were transported in 1938.

Of special pertinence in the present case is a letter dated June 2, 1941, enclosure No. 32, in file B–16151, addressed to the Alcoa Steamship Company in which that carrier was informed in response to a general inquiry relative to freight charges on shipments lost or destroyed en route while moving under Government bills of lading that, under the jurisdiction of this Office, a decision could not be rendered to it upon the abstract question presented. Its attention was invited, however, as a matter of information, to the provisions of the Government bill of lading forbidding prepayment of charges and stipulating that payment would be made on the presentation of the bill of lading properly accomplished, inviting its attention in that connection to the instructions on the bill of lading directing the consignee to sign the consignee's certificate on the bill of lading upon "receipt of the shipment." For a decision to Alcoa Steamship Company holding the deduction of unearned freight charges was required on its bill for transportation of a part

of a shipment that "perished" in transit, see B–35755, August 2, 1943, enclosure No. 33.

Other decisions of this Office applying the principle that the Government bill of lading by its terms requires delivery as a prescribed condition to the right of the carrier to payment of transportation charges and calling attention to the provisions of section 3648 of the Revised Statutes as precluding payment where delivery is not effected are as follows, enclosures 34 to 41, inclusive:

B–30734 June 21, 1943, Coastwise (Pacific For East) Line.

B–30846 September 17, 1943, Bull Insular Line, Incorporated.

B–42113 November 25, 1944, Luchenbach Steamship Company, Incorporated.

B–43523 March 27, 1945, United Fruit Company.

B–41370 July 21, 1945, Lykes Bros. Steamship Company, Incorporated.

B–43023 August 9, 1945, Waterman Steamship Corporation.

B–53596 November 24, 1945, Matson Navigation Company.

B–25057 April 11, 1944, Barber Steamship Lines, Inc.

Looking now at the few instances of decisions of the accounting officers to which the carriers have made reference at times as justifying their contention that the terms of their commercial forms of bill of lading should prevail over those pre-

scribed in the Government bill of lading, it is found that they comprise the following decisions:

24 Comp. Dec. 707.
21 Comp. Gen. 909.
A-24222, August 31, 1943.
A-24222, May 11, 1944.
A-24222, October 12, 1944.

The first of the above cited decisions, 24 Comp. Dec. 707, has been the subject of comment hereinabove and need not be further considered here. The decision reported in 21 Comp. Gen. 909 had to do with shipments as to which it was indicated that consignees' receipts, establishing delivery to them in the Philippine Islands or Guam, could not be obtained due to the chaotic war conditions maintaining in those islands at the time in question. The decision was based upon a submission which expressly proposed that the payments concerned be supported by "a certified copy of dispatch or letter reporting that the particular vessel has discharged cargo at the port to which shipment was destined." Obviously, this decision cannot be taken as authority for the payment of charges on a shipment moving under a Government bill of lading without a showing that the service of transportation called for has been performed.

Concerning A-24222 of August 31, 1943, and May 11, 1944, addressed to the Administrator, War Shipping Administration, it is clear that said decisions were rendered in recognition of the fact that the War Shipping Administration, a Government agency, constituted the carrier, and that, as such carrier, it had found it necessary to

adopt a form of bill of lading suited to its operations in serving both the public and the Government. The War Shipping Administrator was vested under Executive Order 9054, February 7, 1942, and Executive Order 9244, September 16, 1942, with special emergency powers pursuant to the First War Powers Act, 1941, 55 Stat. 838. See in this connection War Shipping Administration General Order No. 16, issued July 6, 1942, 7 Federal Register 5246, prescribing the use of "War Shiplading 7/1/42." It is obvious that there was sufficient justification on the part of this Office in not taking objection to the proposed use of said bill of lading with respect to Government shipments when handled by the War Shipping Administration as carrier.

Concerning the communication of October 12, 1944, addressed to Barber Steamship Lines, Incorporated, in file A–24222, it is to be noted that said letter was written in response to a request from the carrier for information as to whether the "remarks" made in A–24222 of May 11, 1944, addressed to the Administrator, War Shipping Administration, would have equal application to transportation services provided for United States Government Departments and Agencies on vessels other than those owned by or under charter to War Shipping Administration. The reply of October 12, 1944, answering affirmatively the carrier's question and stating that payment of ocean transportation charges might be made to ship lines under the same procedure as theretofore approved for payments to the War Shipping Administration, was preceded by the statement "It is presumed that you have reference to

foreign vessels and in particular the Norwegian vessels for which it is understood your line acts as agents * * *." It is particularly to be observed in this connection that such acquiescence as may be afforded in that letter to the request of the carrier for extension of the principles and procedures previously adopted with respect to shipments handled by the War Shipping Administration was expressly conditioned upon the use, wherever practicable, of the Warshiplading "or a form incorporating the same terms and conditions" to be certified in the same manner as prescribed for the Warshiplading. Whatever may be the effect of said letter with respect to shipments made on documents such as there designated, that letter did not pertain to shipments made, as here, under Government bills of lading. The situation as to shipments made under Government bills of lading had been the subject of consideration in correspondence between the Barber Steamship Lines, Inc., on the one hand and the Maritime Commission and the War Shipping Administration on the other hand during the months of August, September, and October 1944. Said carrier transmitted to this Office with its letter of October 31, 1944, photostatic copies of said correspondence, which included a letter of August 19, 1944, from the United States Maritime Commission to the carrier, stating:

> Your public voucher forms submitted for payment in the amounts of $241.50, $270.20, and $272.90, covering ocean freight transportation on shipments of operating equipment from New York to Lagos, Nigeria and Takoradi on the S. S. *Siranger*, are returned herewith.

> In accordance with an opinion by our Legal Division, payment of freight in this instance, under the terms of the Government bill of lading and the Comptroller General's decision, is not authorized. The Government form bill of lading by clause 1 expressly provides that delivery of the goods to the consignee is a condition precedent to payment of freight, and by clause 2 incorporates a provision contained in another document to the effect that freight is irrevocably earned on shipment, ship or cargo lost or not lost. Since the two clauses are directly contradictory, the rule of construction is that the specific clause contained within the four corners of the contract will prevail over a clause, where, in order to determine its provisions, reference dehors the contract must be made.
>
> Accordingly, we are unable to process the subject vouchers for payment.

Upon a request from the carrier for a further consideration of the question in the light of certain rubber stamped notations, said to have been placed upon the bills of lading involved, the War Shipping Administration in a letter of October 4, 1944, reaffirmed its prior conclusion, stating in part as follows:

> As informed you, we submitted copies of your letters of August 30 and September 11, to our Legal Division for further review and decision, and we are now in receipt of advice to the effect that the information conveyed to you in our letter of August 19, is controlling. However, you have the liberty, of course, to submit the question to the Comptroller General of the United States for a decision.

In order that you may be thoroughly familiar with the position of our General Counsel with respect to this subject we quote herewith the following:

"'Barber Lines' letter of September 11 quotes at length the Comptroller General's letter of May 11. A copy of the Comptroller's letter in question is attached to Traffic Regulation 7-A—Operations Regu- the opinion reported in 21 DGG 909 which siderable language which seems to favor the carrier's right to retain freight after the cargo is loaded even though the vessel or cargo may thereafter be lost. That language involved a situation where WARSHIPLADING only would be used and there would not be any clause involved such as Clause 1 of the Government Form Bill of Lading. That letter therefore could not be taken to mean that the Comptroller General would no longer adhere to the opinion reported in 21 DCG 909 which involved a shipment under a Government Bill of Lading incorporating a carrier's regular form bill of lading."

"Barber Lines" letter of August 30 points out that in the present case the Government Bill of Lading in addition to the regular printed incorporating clause (Clause 2) contained the following stamped provision:

"'Subject to all the terms, conditions and exceptions of the Line's regular form of bill of lading, and where any conflict occurs between this form and the Line's form the latter's terms, conditions and exceptions are to govern.'

"If that stamped clause is valid and would be given effect, the conclusion stated in our memorandum of August 9 would be correct. However, I question whether the

Comptroller General would permit the use of or give effect to such a stamped provision. Nowhere in the Comptroller General's Regulations is any authority given to change any terms of the contract or add new terms or to make any notations except of course such matters as the name of the ship, the name of the shipper, description of the goods, etc. Section 8 which prescribes such matters as the size, color of the paper and other details of the Government Form Bill of Lading, provides that 'no departure from the exact specifications of the standard bill of lading forms herein approved will be permitted, * * *.' Obviously a provision of the contract is of considerable more importance than such matters of form as the size of the bill of lading. Moreover, a further provision in respect to the form of transportation vouchers provides that '* * * in reproducing the said voucher forms outside the Government Printing Office the exact size, wording, and arrangement as approved by the Comptroller General of the United States must be adhered to. * * *' Accordingly, I question whether the stamped clause is valid."

It seems clear enough, therefore, that the correspondence above noted from file A–24222 affords no basis for the conclusion that charges are earned and payable without delivery at destination where the shipments are transported pursuant to Government bills of lading. Copies of the letters under file A–24222 and of Barber Steamship Lines letter of October 31, 1944, are enclosed, designated enclosures Nos. 42 to 45 inclusive. The attachments to the letter of October

31, 1944, are included as a part of enclosure No. 45.

As reflective of the fact that the Government bill of lading, by its terms, prohibits what the carriers urge is the necessary effect in this case—namely that the carriers, upon receipt of shipment at point of origin, become entitled to collect full freight charges applicable for transportation to destination and to retain said charges without any showing of delivery at destination, ship or cargo lost or not lost—attention is directed to Circular No. 7, issued January 22, 1943, by the Chief of Transportation, War Department, having to do with the payment of ocean freight charges on ships of foreign registry. Said circular, enclosure No. 46, was, in part here material, as follows:

> *Prepayment of Ocean Freight on Ships of Foreign Registry.*—1. The following instructions from the Commanding General, Services of Supply to the Chief of Transportation dated January 9, 1943 are published for the information and guidance of all concerned:
>
> "1. Pursuant to authority contained in Executive Order 9001 and to the delegation of authority contained in instrument dated September 15, 1942 from the Under Secretary of War to the Commanding General, Services of Supply, it is hereby directed that notwithstanding provisions to the contrary contained in Government bills of lading, ocean freight charges on cargoes to overseas destinations carried in vessels of foreign registry, not chartered by, controlled by, nor operated by the War Shipping Administration, shall be due and pay-

able after the completion of the loading of the cargo on board the vessel for shipment to the consignee.

"2. The above action is predicated upon a a finding by me that under the circumstances involved, this procedure is necessary to and will facilitate the successful prosecution of the war effort."

2. Transportation Officers when called upon to handle overseas shipments of the above character will observe the foregoing by causing the following entry to be placed on Government bills of lading relating to the above cargoes:

"The ocean freight charges hereon stated are now due and payable, cargo being aboard vessel for shipment to consignee, and necessity for prepayment having been determined by Commanding General, Services of Supply acting under Executive Order 9001 as necessary to and will facilitate the successful prosecution of the war effort."

The assumption seems entirely justified that this circular was issued in recognition of the well established principle that the Government bill of lading provides for delivery at destination as a condition to payment and that without the authority there exercised under the superseding statutory authority of the First War Powers Act, 1941, payment for transportation of such shipments, not delivered at destination, would have been precluded by section 3648 of the Revised Statutes.

Also, on the proposition that any contract, whether Government bill of lading or commercial bill of lading, which undertakes to require the United States to pay through charges to destina-

tion even though the transportation services necessary to effect delivery at destination are not in fact performed—as in the case of frustrated shipments delivered at an intermediate port because of interruption to traffic—would contravene the prohibition contained in section 3648 of the Revised Statutes against payment in excess of the value of the services rendered, there would appear to be of especial significance the statement of Admiral E. S. Land, War Shipping Administrator, in a letter to the Committee on Merchant Marine and Fisheries, House of Representatives, as reported in the Hearings on House Joint Resolution 92 (78th Congress, 1st Session), Public Law 41, 57 Stat. 68, authorizing the refund by the War Shipping Administrator of certain freights paid by commercial shippers for transportation on frustrated voyages, said statement being in part as follows:

> The voyages in question were frustrated by the Japanese attack on Pearl Harbor. Refunds are sought by the shippers and consignees of freight paid on cargo that was short landed as a result of the voyage frustrations.
>
> * * * * *
>
> *These claims are supported, in equity and fairness, if not in law, by the fact that the cargo owners have paid for a service which they did not receive.* In many instances, the vessel never left the loading berth. In others, a part of the contract voyage was completed prior to the frustration. In such instances, the carrier of course incurred some expense, but not to the extent of the full freight. *The excess of receipts over expenses, if retained by the*

carriers, would appear to be a windfall to them. [Italics supplied.]

The War Shipping Administrator's recognition of the windfall to the carriers, and of the inequity to the private shippers, that would obtain, if the carriers were to be allowed to retain freight charges paid but not in fact earned, would appear to be pointed with added emphasis, when consideration is given the fact that in the transaction here in question public monies are involved and that the Government, as a shipper, is subject, in contracting for a transportation service, to the legal limitation imposed by section 3648 of the Revised Statutes. It is deemed worthy of note, too, that the report of the Senate Committee on Commerce on the joint resolution cited above, Senate Report No. 178, contained the following pursuasive comments:

> * * * Moreover, an expression by the Congress through the medium of this legislation will provide a standard of business conduct in this situation which might well be followed by other carriers concerned with the problem, including commercial operators and public agencies responsible for ships operated by nationals of our Allied Governments. * * *

The view that the Government bill of lading and the requirements of section 3648 of the Revised Statutes preclude the payment by the United States for a service not rendered in fact would seem patently consistent with what is thus indicated as being a desirable objective commercially.

It has been the consistent practice of this Office not to authorize payment for transportation charges for services not rendered and to author-

ize payment only when the contract of affreightment has been fully or substantially performed.

This is true of cases involving varied factual circumstances which may be classified, as follows:

1. Cases involving total loss of goods, as illustrated by decision of June 2, 1941, B–16151, (Enclosure No. 32), and decision of September 17, 1943, B–30846 (Enclosure No. 35).

2. Cases of partial loss of cargo, as in decision of August 2, 1943, B–35755 (Enclosure No. 33).

3. Cases involving frustrated voyages as in the decision of November 23, 1946, B–53596 (Enclosure No. 40), and the decision of June 21, 1943, B–30734 (Enclosure No. 34).

4. Cases where cargo was delivered at destination but carrier could not furnish duly accomplished Government bill of lading as shown in the decision of April 7, 1942, B–24613, 21 Comp. Gen. 909.

5. Cases involving payment *pro rata itineris* as covered by decision of November 25, 1944, B–42113 (Enclosure No. 36).

A careful consideration of the matters indicated above will disclose that there has been found, in the examined decisions and instructions of the accounting officers of the United States on file in this Office, no basis of support for the assertion of the steamship companies, as reported in your letter, to the effect that it has been a uniform practice of the Government to consider that the obligation to pay freight charges was fixed at the point of receipt of the goods by the carrier rather than by delivery of the goods to the consignee and that this uniform practice has been varied only during the recent war. On the contrary,

the specific instructions, decisions, and administrative determinations, designated hereinabove, reflect a generally persistent refusal of the accounting officers to accept the view that payment is earned upon delivery of the shipment to the carrier. They show instead repeated affirmations of the principle that delivery to the consignee or at destination is necessary to payment.

Sincerely yours,

LINDSAY C. WARREN,
Comptroller General of the United States.

Enclosures

ENCLOSURE NO. 1

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 9, PAGES 367–369

AUGUST 13, 1842.

Circular to Navy Agents:

SIR: In addition to my circular of the 22nd of March last, I have thought it my duty to call your attention to the following regulations, established for the Government of Navy Agents in making their disbursements and in rendering their accounts for settlement.

1st. In all accounts for articles purchased, the date of each purchase, the name, number, price, etc., of each article must be distinctly specified in the account. All receipts for payments of money must express the amount paid, in words written at full length and all receipts and approvals upon accounts must bear the date when they were written.

2d. In all cases, the original receipt /voucher/ for the payment of money must be produced and

filed with the account, in the proper office of the Treasury, and this cannot be dispensed with, except in cases where the original shall have been lost, beyond the control of the person in whose favor the receipt was given. In this case only, when accompanied by satisfactory proof to this effect, will duplicate vouchers be admitted.

3d. All contracts made by virtue of any law of the United States, which may be in any manner connected with the settlement of public accounts in this office, are required to be deposited in the Office of the Second Comptroller of the Treasury within ninety days after their dates, respectively. /See Act of 16th July, 1798, Sec. 6/. And all such contracts must be so deposited before vouchers for the payment of money under them, will be admitted to the credit of any disbursing officer. When money is disbursed under a contract, the voucher should show this fact, and the date of the contract.

4th. In all cases where public money is paid for services or supplies which may have been rendered or furnished the Government, the *purpose* for which they were required should be distinctly stated in the account /voucher/ as this is indispensible to enable the accounting officers to determine upon what appropriation the expenditure should be charged.

5th. In making up accounts due care should always be taken to charge every expenditure upon the proper appropriation; and should items chargeable to different appropriations be embraced in the same voucher, /as is sometimes the case/ they must be separated and charged to the proper heads; and in no case should the aggregate

amount of such voucher be charged upon one appropriation to relieve another, as this would be, in effect, making transfers of money, contrary to law.

6th. All stoves, grates, fixtures of every kind, cooking utensils, carpeting, and furniture for national vessels, are chargeable upon the appropriation "for increase, repair, armament, etc., of the Navy"; and when required for furnishing buildings or offices attached to a Navy Yard, they are chargeable upon the appropriation for that yard.

7th. All accounts for freight must be accompanied by bills of lading, and proof of delivery to the consignee, viz: his receipt for the articles delivered.

8th. No part of the money appropriated by the 19th paragraph of the Act making appropriations for the Naval Service for the year 1842, can be expended except for the objects therein particularly mentioned. All expenditures for other purposes must be charged to other and proper appropriations. The 19th paragraph, being the *specific contingent* appropriation, is in the following words, viz:

> For defreying the expenses that may accrue for the following purposes, viz:
> For freight and transportation of materials and stores of every description; for wharfage and dockage; storage and rent; travelling expenses of officers, and transportation of seamen; house-rent to pursers when duly authorized; for funeral ex-

penses; for commission, clerk-hire, office-rent, stationery and fuel to Navy Agents; for premiums and incidental expenses of recruiting; for apprehending deserters; for compensation to judge advocates; for per-diem allowance to persons attending courts martial and courts of inquiry or other services authorized by law; for printing and stationery of every description, and for making the lithographic press; for books, maps, charts, mathematical and nautical instruments, chronometers, models and drawings; for the purchase and repair of fire-engines and machinery; for the repair of steam-engines in Navy Yards; for the purchase and the maintenance of oxen and horses, and for carts, limber wheels and workmen's tools of every description; for postage of letters on public service; for pilotage and towing ships of war; for taxes and assessments on public property; for assistance rendered to vessels in distress; for incidental labor at Navy Yards, not applicable to any other appropriation; for coal and other fuel, and for candles and oil for the use of Navy Yards and shore stations, and for no other object or purpose whatever, four hundred and fifty thousand dollars.

The term *machinery* in this paragraph, used as it is, in connection with fire-engines, is considered as meaning machinery for those engines. All expenditures for machinery for other purposes, must be charged to other appropriations.

(Signed) ALBION K. PARRIS.

T.P. and A.K.P.

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[COPY]

ENCLOSURE NO. 2

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 10, PAGE 30

JULY 7, 1843.

Decision in the case of the Schooner "Marietta":

I have examined the annexed statement of the case arising on the claim of the owners of the Schooner *Marietta,* for freight on a quantity of Military Supplies, belonging to the United States from Baltimore to Cedar Keys in Florida.

The statement appears to have been prepared by the Quarter Master General, and is supposed to embrace all the material facts in the case.

On these facts, I am clearly of opinion, that the owners of the *Marietta,* are entitled to a *pro rata* freight only, to be computed according to the benefit which the United States as the freighter had actually received; that is to say, the freight from Norfolk, where the goods were received to Cedar Kays, the port of delivery, should be deducted from the freight of the whole voyage, and the remainder to be a charge on the freighter, which will be the amount of freight due the owners of the *Marietta,* from the United States.

This is the rule adopted by the Supreme Court of Massachusetts in an opinion delivered by Chief Justice Peasons, in the case of *Coffin* v. *Stover,* 5th Mass. Reports, 252, and the principle is well sustained by other authorities.

(Signed) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. —

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 10, PAGE 89, 90, 91, 92, 93, 94

Case of the Schooner "Marietta"—Decision of the Comptroller:

The owners of the Schooner *Marietta,* having requested a reexamination of their claim, against the United States, on the ground that my former opinion given in the case, was predicated on an erroneous statement of the facts, I have obtained all the papers, from the office of the Quarter Master General, and given them a thorough examination.

The undisputed facts in the case, are that on the 11th of August 1842, Capt. Dusenberry, Assistant Quarter Master, in the U. S. Army, shipped on board the *Marietta,* at Baltimore, a quantity of Subsistence Stores, the property of the United States, which the owners of the Schooner, by bill of lading in due form, through their Captain, contracted to deliver at the port of Cedar Keys, in Florida, unto the assistant Quarter Master of the U. S. Army, at that place.

The Schooner encountered a storm on her outward passage and becoming disabled by the perils of the Sea, was obliged to put into Norfolk for repair. The cargo was landed and put into the hands of Messrs. Myers & Co. Agents for the owners of the vessel, who, on the 29th of August, wrote Capt. Dusenberry, informing him that the Schooner had put into Norfolk, in distress and

on the 30th they wrote again to Capt. Dusenberry, stating that one third of the cargo will be found damaged, and that they give this information thus early that he, Dusenberry, "may decide, whether to order the damaged portion to be sold here, (Norfolk) and let the vessel proceed with the undue, or whether you (Dusenberry) will sell the whole *and terminate the voyage here.*

Capt. Dusenberry replied to Myers & Co., on the 31st of August, and informed them that he had referred their letter to Capt. Irivin, Assistant Quarter Master, at Fort Monroe, and requested him to give such attention to the subject matter thereof, as the interests of the public service, may require.

On the 1st. of September, the Commissary General of Subsistence, wrote to Capt. Green, an Assistant Commissary of Subsistence, at Fort Monroe, informing him of the situation of the Subsistence Stores, and directing him, if the Assistant Quarter Master at Fort Monroe, has not attended to it; to proceed and examine the Stores, sell those that are damaged, and let those in good preservation, *go on to Cedar Keys, in the vessel when repaired.* If however, there should be no opportunity of forwarding the good stores, to Cedar Keys, you will take them yourself."

On the 9th of September, Myers & Co. wrote to Capt. Dusenberry, that they had made report to Capt. Irivin, of the articles sold, and they add, "we should like to know whether when the vessel is repaired, you design her to proceed on the voyage with the good portion of the cargo, or to make some other disposition of it, and terminate the voyage here. (Norfolk) *we presume it can*

hardly be an object with the Government, for her to proceed with the remnant left."

On the 13th of September, Capt. Dusenberry replied, *"It is certainly, an object to the Government that the Marietta should proceed on the voyage, as soon as she is repaired."*

On the 24th September, Capt. Irivin wrote to Myers & Co. as follows, "I have just received directions from the Commissary General, to turn over the good provisions in your hands, to Capt. Green. Please send them, per Star, at your convenience, and also, pay over to Capt. Green, the proceeds of your sale, deducting your expenses.

"I can say nothing as to whether the 'Marietta' will be paid her freight this far or not, until I get instructions from the Quartermaster General."

On the 28th of September, Myers & Co. wrote Green, as follows: "we have received a letter from Capt. Irivin directing us to send you by the *Star,* the remnant of a cargo of provisions, left in our hands by the Captain of the Schooner *Marietta,"* etc.

No objections to this arrangement, were made, either by Myers & Co. or by the Captain or owners of the *Marietta,* and the portion of the provisions unsold, were sent to Capt. Green, and received by him, on the 4th of October.

On the back of the bill of lading, is this endorsement, in the hand writing of one of the firm of Myers & Co.:

"Norfolk, Oct. 4th 1842. The within mentioned articles have all been received by me, at this port, in consequence of the Schr. *Marietta,*

having put in here, in distress, and been discharged by the Commissary General, from the farther prosecution of the voyage." This endorsement is signed by Capt. Green.

Capt. Green, in his letter of the 18th of October 1842, to the Commissary General, states: "It was not possible for me to comply with the instructions of your letter of the 1st. of September, as Capt. Irivin had already given directions to the merchants in Norfolk, for the distribution and disposal of the cargo. I regret if any mistake has occurred respecting my signing the bill of lading. It was not my intention to sign, otherwise, than for the articles received here, (Fort Monroe) and for those articles sold at auction in Norfolk, the amount of sales having been placed in Bank, to the credit of the Department. Indeed, I certainly was not authorized to discharge the vessel, and was not aware that my certificate was to that effect."

The Commissary General states that Capt. Green was not authorized to discharge the Schooner, and has so certified on the back of the bill of lading.

Capt. Irivin, in his letter to the Quarter Master General of the 29th of May last says, "I never saw or had any communication with the Captain or owners of the *Marietta*. I had nothing to do with any one, except the Agents, Myers & Co. and with them, I certainly, never made any agreement, or gave any orders, terminating the voyage. My letter of the 27th of September 1842, will show that I had no such understanding."

Capt. Green, in a letter to the Quarter Master General of the 17th of June 1843, says, "I am in

total ignorance of and cannot conceive how it was possible for me to append my official signature to such an unauthorized certificate."

I have given a fair abstract of the case, and there does not appear to my mind, much difficulty in understanding it. In the first place, I am satisfied that in strict law, Capt. Green had no authority to discharge the Schooner—that authority resting entirely with the Quarter Master's Department, with which the ship owners contracted—and that the Subsistence Department to which Capt. Green belonged, had no control whatever, over contracts entered into by the Quarter Master's Department, and consequently could not modify annul or discharge them.

In the second place, I am satisfied that Capt. Green did not assume to exercise any such authority. The certificate that he signed, does not state that *he* discharged the Schooner, but that she "had been discharged by the Commissary General, from the further prosecution of the voyage." Such was not the fact. There is not a particle of proof in the case, that the Commissary General undertook to do any such thing, but on the contrary, expressly directs to have the stores go on to Cedar Keys, in the vessel, when repaired.

Finally, from the tenor of Messrs Myers & Co's letter to Capt. Dusenberry, of the 9th of September, it is apparent that the owners were willing of not anxious, to have the *Marietta* relieved from proceeding on her voyage. This could not be done without the consent of the shipper. Capt. Dusenberry's reply of the 13th of September, advertised the owners that they were to be held to their contract. They could, therefore, obtain

no release from the Quarter Master's Department, and Capt. Irivin, when as Assistant Quarter Master, he consents to take the goods, by authorizing their delivery to Capt. Green expressly warns the owners, that there may be doubt whether any freight will be paid.

Notwithstanding this admonition, the goods are delivered, an entry made on the back of the bill of lading, which the owners *now* contend is equivalent to an interruption of the voyage, by the freighter, against their consent.

This would not have been their course of procedure, if they had been disposed to have prosecuted the voyage. In that case, their answer to Capt. Irivin would have been prompt and decisible, to this effect: "Sir, If you can say nothing as to whether the *Marietta* will be paid her freight *this far*, even," (That is to Norfolk) we will instantly settle that doubt: We will not deliver you a particle of your goods, but proceed to prosecute the voyage."

If they had done so, who would have interposed an objection? Not the Quarter Master's Department, for Dusenberry had already told them, that it *was* an object for the Government, that the *Marietta* should proceed on her voyage, as soon as she is repaired. Not the Commissary's Department, for directions had been already, given by the Head of that Department to have the stores in good preservation go on to Cedar Keys, in the vessel when repaired.

The remark of the Messers. Myers & Co. in their letter to Capt. Dusenberry, that "we presume it can hardly be an object with the Government, for the vessel to proceed with the remnant

left, "shows that they did not expect freight for the whole voyage, if the voyage should be terminated at Norfolk. If the Government was at all events, to be chargeable with freight for the whole voyage, it would most certainly, be an object to have the goods delivered at the original port of destination. If *Pro Rata* freight only, was to be charged, the Messers. Myers & Co. might well presume "it would hardly be an object to the Government to have the voyage prosecuted."

There might have been various reasons why the owners preferred to have the voyage terminated at Norfolk. It appears by the Master's protest, and the survey held on the *Marietta*, that she needed extensive repairs. It might *not* have been convenient for the owners to place the vessel in a sea-worthy condition in proper season to pursue the voyage, and if that could have been done, more profitable employment might have offered. By whatever reasons, they might have been influenced, it is very apparent that they were willing, and the officers of the Government unwilling to have the voyage abandoned.

On the whole, I should be doing injustice to the fair mercantile character of the Messrs, Myers & Co., to infer that they had any object in taking from Capt. Green, the acknowledgement, in writing on the back of the bill of lading, except to show that he had received the articles shipped, and to relieve the owners from accountability therefor. I am unwilling even to entertain a suspicion that in this transaction an attempt was made to circumvent the Government by obtaining from one of its Agents, a certifi-

cate of a fact, which had no existence. They might with fairness, obtain such a certificate, on delivery of the goods as would entitle the owners to a pro rate freight, but that they expected Capt. Green or any other officer of the Government to certify that the Marietta was discharged from the further prosecution of the voyage, *against the consent of the owners,* or that they intended to prepare a certificate for him to sign, of that purport or susceptible of that construction, I do not believe, as it would be wholly inconsistent with all the facts bearing upon that point, in the case.

But let the construction to be put upon Green's endorsement, be whatever it may, it is not contended that the owners of the Schooner, made any provision to transport the goods in another vessel, or claimed the right to pursue the voyage, with the Marietta, when repaired, or that they made any objection to the delivery of the goods to Irivin or Green. It was a voluntary act on the part of the ship-owners, which they might have declined at their pleasure. Taking all the circumstances into consideration, I think the further prosecution of the voyage was abandoned or waived by both parties. Not having objected, their assent is to be inferred.

Now, what is the law in such a case? "If the freighter accepts the goods, a the intermediate port, freight is to be paid, according to the proportion of the voyage performed, and the law will imply such a contract." It is settled law that pro rate freight only, is due, where the ship, by inevitable necessity, is forced into a

port short of her destination, and being unable to proceed on her voyage, the goods are there voluntarily accepted by the shipper.

If the cargo is not conveyed to the place of its destination, no freight can be demanded. If voluntarily accepted, at any other port, by the freighter, freight pro rate is due. I know of no reported case, of any authority, where freight was allowed *for the entire voyage,* when such voyage had not been performed, the ship by reason of perils of the sea, having gone into an intermediate port to refit, and the goods having been there, voluntarily received by the freighter, with the consent, and in accordance with the wishes of the ship-owner. But the books are filled with cases, where, under such circumstances, a *pro rate freight* was allowed.

It is only in a case where the master or ship-owner offers to complete the voyage, and the freighter will not consent, that full freight can be claimed. If the owners of the Marietta, and manifested any unwillingness to deliver the cargo at Norfolk, their claim to full freight, might have had some semblance of equity. But when, instead of resisting, they virtually invite the delivery, and make it without objection, notwithstanding the intimation of doubt by the freighter, whether any, even a pro rate freight would be paid, a claim to freight for the entire voyage, could find no countenance either in law or equity.

(Signed) ALBION K. PARRIS,
Comptroller, etc.

SEPT. 21, 1843.

ENCLOSURE NO. 3

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 11, PAGES 249–250

MAY 18, 1846.

Maj. Gen. JESUP, *Quartermaster Gen.*

SIR: I have received the paper's relating to the case of the Schooner *Magnet* and have carefully examined all the legal authorities within my reach applicable to said case.

The facts, I understand from the papers are that on the ninth of December 1845 at New Orleans the *Magnet* was chartered for the sum of eight Hundred and fifty dollars to take on board and transport for the Quarter master's department to Aransas Bay in Texas such cargo of public stores etc. as the Deputy Quarter master General at New Orleans might see fit to ship in her, and to land and deliver the same at St. Joseph's Island in Aransas Bay to the Officer in the Quarter master's department there, and on the faithful and satisfactory performance of the contract on the part of the owners of the Schooner, the said Deputy Quarter master General agreed to pay the stipulated sum above mentioned of eight hundred and fifty dollars—that on the 16th of said December sundry articles of public property were shipped in said schooner, and on the same day she departed on her voyage, but before reaching her destination she was wrecked. A portion of the cargo was saved by the Officers of the United States and the remainder was lost, no part having been delivered at the place of destination agreeably to the stipulations of the contract.

The law seems to be well settled that in such a case no freight is due under the charter party. The contract of affreightment is considered as an entire contract and unless fully performed by the delivery of the whole cargo no freight can be legally claimed. The delivery of the whole cargo is a condition precedent to the recovery of freight.

All the papers in the case are herewith returned.

Respectfully,

(Signed) ALBION K. PARRIS.

ENCLOSURE NO. 4

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 11, PAGE 379

DECEMBER 29, 1846.

Col. H. STANTON, *Apr. Q. M. Genl.*

SIR: I have examined the papers relating to the claim of *Capt. Hallock* for freight of sundry store shipped on board the *Schooner Brave* for transportation from New York to Brazoa Santiago. I understand that the Brave was a general ship and that the freight stipulated to be paid by the U. State was according to the quantity of goods shipped which are particularly set forth and described in the bill of lading. In such a case freight is due for what the ship delivers, and nothing more. This case is distinguisable from that of the *Magnet* decided by me some time ago. In that case the ship was chartered for a specific sum, for the voyage, and no part of the cargo was delivered at the point of destination and of course no freight was earned. I notice in the

case of the Brave that a part only of the cargo shipped by the U. State was delivered. The Master should account for the residue, and if a part or the whole of *that* was thrown overboard to lighten the ship as appears probable from the Protest of the Master filed in the case the loss should be borne, as general average, by the owners of the ship and the cargo saved. All the papers received with your letter of the 16th inst. are herewith returned.

I am very respectfully Yours,

(S) ALBION K. PARRIS.

AKP.

[COPY]

ENCLOSURE NO. 5

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 11, PAGES 423, 424

MARCH 1, 1847.

Col. HENRY STANTON,

Asst. Quarter Mr. Genl.

SIR: I have examined the papers received with your letter of the 27th ulto. in support of the claim of *Henry Sadler,* Master of the Brig *Mount Vernon* for freight on sundry government stores and horses, shipped on board said brig at New Orleans for Tampico, Mexico.

I notice by the receipt on the back of the Bill of Lading that a small part only of the property shipped has been delivered and for that part the freight is claimed. By the protest of the Master

it appears that the Brig encountered violent gales of wind, and for the safety of the vessel and other parts of the cargo, the Captain was compelled to throw overboard a portion of the hay mentioned in the bill of lading. That loss should be remunerated by general average contribution assessed on the vessel freight & cargo saved.

In regard to the horses; if they were properly secured and taken care of and were lost by the perils of the sea, the loss must be borne by the shipper; but if they were lost through the negligence of the ship owner or his agents, the loss must fall on him. If they were lost by being thrown overboard for the safety of the vessel and the lives of the crew, the loss is to be borne by general average, as stated above.

No mention is made in the protest of throwing overboard any of the cargo other than the hay and horses. For the residue, viz: the coal, the boards, the horsebuckets and thirtyeight bundles of hay, no account is given, and as they were not delivered to the consignee nor lost by the perils of the sea, the Master of the Brig must be held answerable for their value.

I do not consider the claim for freight admissible under the state of the case as shown by the Bill of lading and Protest, which are the only papers before me, and are herewith returned.

With much respect, etc.

(Signed) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 6

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 37–38

JULY 10, 1847.

To Maj. Genl. JESUP, *A. M. Genl.*

SIR; I have examined the papers submitted to me from your office on the 7th instant in support of the claim of the owners of the Schooner *William Ryan,* for freight and a quantity of govt. Stores shipped in said schooner on the 22th of January 1847, at Brazos Santiago for Tampico, and also for general average contribution on account of the jettison of a part of the cargo of said schooner on the voyage from New Orleans to Brazos Santiago, on the 24th of November 1846.

In regard to the latter claim for average, I am satisfied that, if the facts relating to the jettison are correctly stated, in the protest, the part of the cargo thrown overboard was sacrificed as the price of safety of the vessel and the residue of the cargo, and that they are liable in law to contribute to repair the loss.

It appears, by papers in the case, that the Nashville Insurance Company have insurance on the schooner, and the St. Louis Insurance Company have insurance, on her freight list, and that they, through their agencies at New Orleans, have severally paid the contributions apportioned to their offices respectively, agreeably to the adjustment of A. Brothers Insurance Brokers, or adjuster, at New Orleans.

I have examined that adjustment, and perceive no cause to doubt that it is stated according to

law, and the usage and customs of the port of New Orleans.

In regard to the claim for freight, it appears by the bill of lading, that a quantity of oats, lumber and coal, was shipped in said schooner by Qrth. Mst. Hill, on the 22 of Jan. 1847, at Brazos Santiago to be transferred to Tampico & delivered to Q. M. Babitt at that port.

It appears by the certificate of Capt. Babitt on the back of the bill of lading, that only a part of the cargo shipped, was delivered, and a portion of that delivered was damaged. Capt. Babitt adds to his certificate these words "The remainder of the cargo said by the master to have been delivered at the Brazos."

Of that, no proof is offiered to me. The mere declaration of the master, of the delivery of the cargo, is not legal evidence, especially where the delivered is alleged to have been at a place different from that required by his own stipulation in the Bill of Lading, and yet more especially when he asserts, as in this case, that the delivery was at the very port of shipment.

Before the claim for freight can be admitted, it must be made to appear, that the contract has been fulfilled on the part of the owners, that is, that the goods shipped have been delivered to Capt. Babbitt at Tampico in like good order and condition as when shipped; or injured by the perils of the sea, or as expressed in the Bill of Lading, "by the dangers of the navigation."

My opinion, thus expressed on the two questions, submitted is predicated on the facts as they appear in the papers. As they have been sent to me from the Q. M. Dept. without com-

ment, I must infer that nothing is thence known calculated to weaken or impair their effect. They are herewith all returned.

Respectfully etc.

(S) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 7

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 124

Nov. 3, 1847.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have examined the papers transmitted to your office by *Capt. Jordan,* Asst. Qr. Mr., and referred to me by your letter of the 26th ult.

As the contract for transporting the troops was made by Qr. Mr. Smith with D. B. Miller, I am of the opinion that you cannot safely make payment for the transportation to any other person, unless it be by Miller's order, and not to him, until you have satisfactory proof that *his contract with Smith has been fully performed.* I do not consider Smith's certificate of that fact indispensable. Any other proof, satisfactory to you, showing that the contract has been complied with on the part of Miller, would be sufficient.

In regard to the demurrage, if, as you state, the owner of the Boat claims of Miller but one day's demurrage, it is to be inferred that She was detained but one day, under circumstances to entitle her to demurrage.

I do not perceive anything in Capt. Jordan's letter that requires a more extended reply.

All the papers are herewith returned.

I am, etc.,

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 8

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 177

FEB. 9, 1848.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have examined the claim of Benj. a B. Cook, for service of the Schr. *Elizabeth,* as requested by your letter of the 29th ulto. Having occasion for a more full statement of the case. I applied to Col. Hunt, who on the 5th inst. furnished the information desired.

It appears, that on the 8th of July last, the Master of the Schooner *Elizabeth,* as agent for the owner, contracted with an officer of the Qr. Mr. Depart. to transport in said schooner, from Fort Pickins in the harbor of Pensacola, to New Orleans, the officers and men and baggage of Compy. G. 1 Artillery, for which service the Master of the schooner was to receive *three hundred dollars.* It further appears, by an endorsement on the contract, that, in the prosecution of the voyage, the Schr. was wrecked on the north end of Chandelier Island, from which place the Company was transported to New Orelans by another vessel, under a contract made by an officer

in behalf of the United States, at an expense of *two hundred dollars.*

Col. Hunt reports to me that when the *Elizabeth* was wrecked, she had "performed about one fourth or one third of the distance between Fort Pickens and New Orleans."

The legal right of the owners of the Schr. to a pro rata freight, depends upon whether the further transporting the troops was intentionally dispensed with on the part of the United States. It is well settled law, that when a ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods shipped are there voluntarily accepted by the owner, a pro rata freight is due.

The evidence upon this point is not full, but unless the Qr. Mr. Department has information that the fulfilment of the contract was insisted on by the officer in charge of the troops, I think it may be inferred, from what appears in the case, that it was dispensed with, and, consequently, the claim to a pro rata freight, is valid.

All the papers are herewith returned.

I am, very respectfully Yours,

(s) ALBION K. PARRIS.

ENCLOSURE NO. —

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 234

MAY 3, 1848.

Maj. Gen. JESUP, *Qr. Mr. Genl.*

SIR: In my opinion of the 9th of February last on the claim of the owners of the Schooner *Elizabeth*, I state that the legal right of the

owners of the schooner to a pro rata freight depends upon whether the farther transporting the troops was intentionally dispensed with on the part of the United States. By the statement of Capt. Winder transmitted with your letter of the 2nd. inst. it appears, that no efforts were made on the part of the owners of the schooner to procure transportation for the troops after she was wrecked, and that the transportation was procured from necessity by Capt. Winder. Under this statement of facts I do not consider owners of the *Elizabeth* entitled to any freight.

The papers are herewith returned.

I am etc.,

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 9

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 235

MAY 3, 1848.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have received yours of the 29th ulto. in which you request to be informed whether the United States is liable for the freight of sundry horses that perished on the passage from New Orleans to Vera Cruz, during a severe storm.

It appears by the papers received with your letter, that on the 19th of October last the U. States Quarter Mr. stationed at New Orleans shipped on board the Bark *Rothschild* then lying at that port and bound for Vera Cruz in Mexico, seventy-four public horses, which the master of the said Bark agreed to deliver to the U. States Qr. Mr.

at Vera Cruz (the dangers of the navigation only excepted) for freight at the rate of fifteen dollars for each horse.

By an endorsement on the Bill of lading, it is certified that fifty-two of the horses were thrown overboard in a gale of wind, and in the Protest of the Master and others it is stated that said fifty-two horses died from the violence of the gale and were thrown overboard. On this statement of facts, I am clearly of opinion that freight for the horses lost cannot be legally claimed of the United States. The law upon this point is well settled, in proof of which I might refer to many authorities. I will merely mention the case of *Griggs* vs *Austin*, 3 Pickering's Massachusetts) Reports, p. 20, where goods shipped at Boston for Liverpool were lost, by the perils of the sea, within six miles of the latter port. The Court decided that the freight having been paid in advance, might be recovered back by the shipper. That case was argued by eminent counsel, and the opinion of the court reviews the authorities and puts the question at rest.

The papers are returned herewith.

I am, etc.,

ALBION K. PARRIS.

(Attachment for decision of May 3, 1848, volume 12, page 235)

Nathaniel Griggs et. al. v. *Samuel Austin, et. al.*, (1825) 4 Pickerings (Mass.) 20. Action in *indebitatus assumpsit* for money had and received.

In November 1822, plaintiff shipped 904 barrels of Apples from Boston to Liverpool on

board the Ship *Topaz;* freight was paid in advance to defendants, owners of the ship for the intended voyage; ship was stranded at Crosby, six miles below the port of Liverpool and apples lost due to the damage by salt water. The bill of lading provided for delivery in like good order and well conditioned at the port of Liverpool, the dangers of the sea only excepted.

Held by court that ship owner was not answerable for the value of the cargo lost due to dangers of the sea or mishaps of navigation not due to negligence of master or crew or lack of seaworthiness of vessel, but that freight is the compensation for the carriage of the goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid unless there be a special agreement to the contrary.

Judgment for plaintiff.

Cases cited by counsel and court to support holdings: *Lane* v. *Pennimon & Tr.,* 4 Mass R. 91; *Mashiter* v. *Buller,* 1 Campb. 84; *Howland* v. *The Brig Lavinia,* 1 Peter's Adm. Rep. 126; *Sampson v. Bull,* 4 Dallas 459; *Giles, et. al.* v. *The Cynthia,* 1 Peter's Adm. 203 (1801) (Fed. Cases #5,424).

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 246

MAY 22, 1848.

Maj. Genl. JESUP, *Q. M. Genl.*

SIR: I have received yours of the 16th inst, inclosing additional testimony in the case of the Rothschild.

I still adhere to my opinion of the 3rd inst. in this case, that no freight is due on the horses thrown overboard *in the gale*, as certified by the Q. M.'s endorsement on the back of the Bill of Lading. It is now testified by the Master that "of the whole number of Seventy-four horses taken on board at New Orleans, only twenty-two remained alive at the time of our arrival at Vera Cruz. At the time of our arrival twenty-one of the horses were on deck, dead, the others had been thrown overboard before our arrival." The Captain adds "I went on shore immediately after our arrival at Vera Cruz and reported to Capt. Elliott, United States Quarter M. notifying him of the horses that were in good order on board, and of those that lay dead on deck. He ordered me to land the live ones, and to throw the dead ones overboard, which I accordingly did."

It had been repeatedly decided by Courts of the highest authority in the United States, that "Where goods arrive at the port of destination in so damaged a state as to be of no value, the owner of them is not at liberty to abandon them for the freight, but the ship owner is entitled to recover full freight for the voyage." I think you may allow freight on those horses that were thrown overboard in the harbor of Vera Cruz by order of the consignee, the vessel having arrived at her port of destination, and the horses on board at the time of her arrival having been disposed of agreeably to the direction of the Quarter Master to whom they were consigned.

The papers are herewith returned.

I am, etc.

(S) ALBION K. PARRIS.

ENCLOSURE NO. 10

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 13, PAGE 188

Nov. 17, 1849.

Maj. Genl. JESUP, *Q. M. Genl.*

SIR: I have examined the papers in the case of the claim of the owners of the Steamer *Mary Kingsland,* referred to me with your letter of the 13th instant.

On the 18th of August, the owner of the aforesaid Steamer agreed to charter her at New Orleans to the United States' Quarter Master's Department for a voyage to Fort Brooke, Tampa Bay, in Florida and agreed to transport in her such number of United States' horses, mules and Stores, and persons in the public service, as Col. Hunt, Deputy Quarter Master General, should think proper to send on board. In consideration whereof, when performed to the satisfaction of the officer of said Department at Fort Brooke, the owner of the steamer agreed to receive, in New Orleans, four thousand five hundred dollars.

On the 21st August, the steamer was reported to Col. Hunt as ready to receive cargo, and thereupon a large number of horses and mules, and wagons, and forage, and other Quarter Master's Stores, were shipped on board, for which the agent of the steamer signed bills of lading in the usual form.

It appears by an endorsement on the charter party that on the night of the 27th of August, the "Steamer burst one of her boilers either killing or scalding most, if not all, the horses and mules. They were all thrown overboard together

with all the hay and oats which were on deck, and part of the waggons and other Quartermaster's property." At the request of the Master of the *Mary Kingsland,* the Quarter Master at Fort Brooke sent the U. S. steamer *Col. Clay* to bring the disabled steamer to her anchorage, where "she was unloaded and discharged."

The owners claim the full freight stipulated in the charter party.

In an opinion given by me on the 18th May, 1846, on the claim of the owners of the Steamer *Magnet,* I had occasion to state the law applicable to a case somewhat similar to the one now before me. It seems to be settled law, that if a ship be chartered at a specific sum for the voyage, and she loses part of her cargo by a peril of the sea, and conveys the residue, no freight can be claimed under the charter party. Such a contract of affreightment being considered an entire contract, unless fully performed by a delivery of the whole cargo, no freight is due under it, the delivery of the whole cargo in such a case being a condition precedent to the recovery of freight. This doctrine is fully recognized by Chancellor Kent, 3 Commentaries, 227, 3 edition; and by Abbot on Shipping, 5 Amer. edition, 524.

In the case of the *Magnet,* above-referred to, I gave an opinion, that nothing could be allowed as freight in any form, inasmuch as no part of the cargo was delivered.

In the present case, a part was delivered, and although, as above stated, nothing can be claimed

under the charter party, yet, in the language of Abbot, above cited, "it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them.

In a case before the supreme Court of New York, 1 Johnson's Rep. 24, the court held that where the ship is chartered for a specific sum for the voyage, the general rule is, that if a part of the cargo is lost by the perils of the sea, and a part conveyed to the port of destination, there can be no apportionment of freight *under the charter party.* A majority of the court, however, inclined to the opinion, that there might, in another form of action, be a recovery of freight, in proportion to the amount of the goods delivered. In the present case, I am inclined to adopt the above suggestions, as thereby equitable relief will be afforded to the owners of the steamer, and as such a course will better comport with the character of the government than to shield itself under the strict law applicable to the charter party.

If you shall be satisfied that there is no blame imputable to the owners, either on account of defects in the steamer, or on any other account, connected with the loss of the public property, I think you may, in this case, allow freight in proportion to the goods delivered.

The papers are herewith returned.

I am, very respectfully, Yours

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 11

DECISIONS OF THE SECOND COMPTROLLER OF THE TREASURY, VOLUME 18, PAGE 44, 45

FEBRUARY 16, 1855.

Major D. H. VINTON,
Qr. Mr., U. S. A., St. Louis, Mo.

SIR: Your letter of the 1st instant in relation to payment for certain *army supplies* consumed by a contractor for their transportation, who is not named, was received this morning.

You state that the contractor is willing to pay for the supplies which were used for the maintenance of himself and his teamsters, on the route from Fort Leavenworth to El Paso, and you wish to know whether the prices shall be computed at the place of departure or the place of delivery.

I regret that you did not send me a copy of the contract, or if it be filed here that you did not indicate it, so that it might be seen whether or not there were any stipulations in regard to part delivery; as under a general contract to deliver specified articles and quantities, no recovery could be had for part performance. Assuming however, that the supplies which reached El Paso, were duly accepted, and the right of the contractor to receive payment for their transportation admitted, on strict legal principles the contractors would be liable to make good, at the place of delivery, the deficiency in the supplies he had bound himself to deliver—the United States allowing upon such replaced supplies, the contract rate of transportation. But when supplies

are consumed from necessity, or lost by unavoidable accident, *en route* to the place of delivery, it has been the practice of the Government, heretofore, to debit the contractor only with the price at the place of departure, disallowing, of course, any charge for the transportation of the supplies so lost or consumed. This practice is equitable, and as I see no reason why it should be interrupted, the accounts of contractors in such cases may be adjusted in conformity with it.

I am, etc.

(S) I. M. B.

ENCLOSURE NO. 12

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 18, PAGE 312

JUNE 25, 1855.

Maj. Genl. THOS. S. JESUP,
Quarter Master Genl.

SIR: The papers connected with the freight claim of owners of Steam Ship *Louisiana,* which were transmitted with your letter of the 23d instant, are herewith returned.

It seems that a part of the stores (oats) shipped by the United States were lost and part delivered in a damaged state to the consignee. The owners propose to pay the cost of the lost articles, 362 bags of oats, on condition that the stipulated freight per bushel be paid on the remainder.

It is in proof that the loss and damage were caused by the perils of the seas, without fault on the part of the master or crew.

Under such circumstances, in case of a general ship, or a ship chartered for freight to be paid according to the quantity of goods shipped, freight is due for so much as may be delivered even if damaged, when the rest has been lost by a peril of the sea; more especially if the agent of the freighter has received the goods, as in that case the damaged can not be set up as a defence to an action for freight.

I should recommend therefore that, in this case, the proposition of the owners be accepted.

I am, etc.

(S) J. M. B.

[COPY]

ENCLOSURE NO. 13

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 19, PAGE 183, 184

Claim of John S. Wright, for passage money etc. Steamship *America*—burnt before she reached her destination.

Endorsed on Auditors Report:

I concur in the reasoning and conclusions to which the Auditor has arrived, and, after a careful examination of all the documents I affirm his decision.

Passage money and freight are governed by the same rules as between the passenger or freighter and the Ship owner or master.

The contract for conveyance of persons or goods is in its nature and entire contract, and unless it be completely performed by delivery at the place of destination, the passenger freighter

or consignee will not be subject to any payment whatever. The best authorities hold this doctrine, on the very reasonable ground that the freighters etc. would not in general derive any benefit from the time and labor expended in a partial conveyance. The cases in which partial payments may be claimed are exceptions.

Judge Story held that in cases even where freight had been paid in advance the owner could not retain it without an express stipulation to the purpose, but that the shipper would be entitled to recover it back, (3 Sumner 66.) Much less could a claim for freight or passage be sustained when payment was to be made on the delivery of the goods or persons at a place which the vessel never reached. In that case a condition precedent remains unfulfilled.

In this case the claimant made an absolute contract with the United States which in consequence of a calamity, for which neither party is to blame, remains unfulfilled on his part. He is a sufferer and so is the government, by his inability to perform what he had bound himself to do. It is true that it appears that the claimant proffered conveyance, after the burning of the *America,* on a vessel which was not accepted by the Agent of the government, and which no legal obligation required him to accept. The proposal therefore cannot be held to be a legal performance of the contract, or to affect the rights of the parties as they previously stood under it.

2d Comp. Office, January 12, 1856.

J. M. BRODHEAD, *Comptroller.*

ENCLOSURE NO. 14

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 19, PAGE 215

FEBRUARY 11, 1856.

Gen: J. G. TOTTEN,
Engineer Department.

SIR: Your letter of the 9th instant in regard to the rule requiring accounts for freight to be accompanied by bills of lading, was received this morning.

This rule was designed to apply only in cases where according to custom bills of lading are given in the ordinary course of business, as in shipments from one port to another, and was not intended to create a necessity for vouchers not generally obtained.

For transportation of public supplies and materials on rail roads etc., a properly receipted bill for the service, with the certificate of the proper officer that the articles were delivered would be sufficient in that respect, as it is not customary for bills of lading to be given for freight upon rail roads.

The vouchers in Capt. Meig's account, referred to by you, are understood to be admissible under this explanation of the rule, which is equally applicable to the accounts of other officers.

I am etc.

(Signed) J. M. BRODHEAD.

[COPY]

ENCLOSURE NO. 15

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 20, PAGE 166

APRIL 1, 1857.

Maj: Genl. THOS S. JESUP,
Quarter Master General.

SIR: Your letter of the 28th ulto in regard to the claim for freight of *Messrs. Sanford & Bros.*, Agents for Steamer *Mons Greenwood,* was received yesterday with the papers in the case.

Upon an examination of all the documents, I am satisfied that the sum claimed ($894.87) was rightfully withheld from the freight, and that as between individuals the owners could not have enforced by law payment even of the sum they received; for the contract of affreightment is not fulfilled on the part of owners until the shipped goods have been delivered by them at the place of destination. It is usual, however, when a ship is forced by necessity into a port short of her destination, and the goods are accepted by the consignee, or some person authorized to accept them, to allow freight *pro rata itineris practi-* for the portion of the voyage performed. That has been done substantially in this case, and your decision rejecting the claim for more, is in my opinion correct. All the papers are herewith returned.

I am, etc.

J. M. B.

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 28, PAGES 134–135

JULY 8, 1865.

SIR: I return the papers in the case of the owners of the Barque *Whistling Wind*.

It appears that this vessel while on a voyage from New York to New Orleans was captured by a rebel privateer called the *Coquette* and commanded by one Read, a deserter from the U. S. Navy.

The value of the vessel was appraised at $14,500.00, and the war risk to this amount was assumed by the United States.

The guaranty is as follows: "The United States Government assumes the war risk on the passage of the vessel out to New Orleans, and until discharge, the valuation being fourteen thousand five hundred dollars $14,500.00.

The owners have already been paid the above sum on account of the loss of their vessel. They now claim the freight amounting to $4,075 and ship's expenses $1,869.10.

The United States not having assumed any risk whatever in respect of the freight, are not in the position of insurer, no claim can, therefore, be maintained against the Government as an insurer. But if it be admitted that the United States was insurer for the freight, as well as the ship, it does not avail anything.

The agent of the Gov't by an express contract agreed that the total liability to be assumed should not exceed $14,500.00. He has paid over to the owners of the Barque this amount, and the contract on the part of the United States has been fulfilled and completed. But if the

United States had not fixed their liability in the promises, they would still be held not responsible. The authorities are all agreed that when the loss of the vessel is occasioned by perils of the seas, fire, enemies, pirates etc., there is also a loss of freight Vide Phillips, insurance Vol. 2 p. 353. 354; Parsons War Law vol. 2 p. 385, 391. This principle is also laid down in the case of *Blanchard* v. *Buckman,* 3 Green-leaf 1. Vide Abbotts Shipping, p. 470, Note 1; p. 405, Note 1. In regard to the claim for ships expenses of 1,869.10 it is not perceived how they can be connected with the freight, thus the clearance fee, advances to crew, pilot, towage, ballast, stores, stevedore, water, provisions, Captain's wages, Marine insurance, chronometer, charts etc., are regarded as legitimate expenses of the ship and not of the cargo and freight.

A portion of these expenses is looked upon as essential to the sea worthiness of the vessel, and a neglect to provide the vessel with sufficient water, provisions & stores for the officers and crew, or shronometer, maps, charts, & pilot, for the safe navigation of the vessel, would bar the right of recovery of insurance in case the vessel was lost.

The United States agreed to pay to the owner of the *Whistling Wind* at the rate of $9.50 per ton, for the carriage of 450 tons of coal from the Port of New York to New Orleans; that the vessel should be seaworthy, and that she should deliver her cargo, are conditions precedent to the payment of freight. *Prima facie* the vessel was seaworthy, but having been captured by a rebel pirate, and in consequence having been prevented

from earning the freight, she is not entitled to any compensation, the papers are herewith returned.

(S) J. M. BRODHEAD, *Comptroller.*

S. V. NILES, Esq., *Washington, D. C.*

Marginal reference 134, 581 not pertinent.

[COPY]

ENCLOSURE NO. 17

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 33, PAGES 72–73

MARCH 31, 1870.

SIR: I have received the papers in relation to the payment of freight on certain goods belonging to the United States, shipped by Brevet Maj. Gen. Rufus Ingalls, Asst. Q. M. Gen. New York City, to Brevet Col. Henry C. Hodges, Q. M. U. S. A. Philadelphia, per Steamer *Eutaw*, Dec. 12, 1869, the freight on which was fixed, in the Bill of Lading, at Twenty-one dollars. ($21.)

This case was referred to me from your office, for information "whether the full amount of freight money may be paid to the owners of the steamer *Eutaw*"? It appears from the report of the Board of Survey, that it was in evidence before them, that the steamer was stranded and lost, on her way to her port of destination. That a portion of her cargo was saved by wreckers. A Board of Survey was appointed to assemble, Jan. 24, 1870, at the Schuylkill Arsenal, Philadelphia, "to determine and fix the responsibility for damage and deficiency of supplies invoiced by Bvt. Lt. Col. Wm. B. Beck 1st. Lt. 5th. U. S.

Artillery, Acting Asst. Qr. Mr. Fort Adams, Rhode Island, to Capt. Wm. H. Gill, Military Storekeeper, Qr. Mr. Dept. U. S. A." Upon examining the evidence in the case, the Board found, "that the disaster to the vessel was not attributable to any neglect of duty, or want of vigilance, or proper care on the part of the officers or crew of said steamer."

There is no evidence with the papers to show whether the property shipped by the United States, was delivered at Philadelphia; but it is presumed it was, otherwise a Board of Survey would have had nothing to consider. If the property shipped, or a portion of it, was delivered in conformity with the terms of the agreement, notwithstanding it may have been damaged by the perils of the sea, if so damaged, as appears by the finding of the Board of Survey, without fault or neglect of the officers or crew of the Steamer, the freight, on all that was delivered was earned, and should be paid. See Second Comptroller's Digest. Title, "Freight".

If the property was not delivered, no freight can be paid; it being a well settled rule, that no claim for freight can be admitted until there is evidence of the delivery of the goods. If the Quartermaster General finds that the goods, or a portion of them, shipped, were delivered at Philadelphia, even though injured, the finding of the Board of Survey, as above stated, will justify the payment of the sum fixed in the Bill of Lading, if all were delivered; or a *pro rata* amount on such as may have been delivered, if not all.

But unless actually delivered, the freight cannot be paid.

J. M. BRODHEAD, *Comptroller.*

Maj. Gen. M. C. MEIGS, *Qr. Mr. General.*

[COPY]

ENCLOSURE NO. 18

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 24, PAGES 666, 667, 668

TREASURY DEPARTMENT,
2D COMPTROLLER OFFICE,
Feb. 14th, 1863.

SIR: Your letter of Nov. 18th, 1862, relating to claim of Brig *East* was duly received and considered.

It is claimed that the Brig took Government freight on Bill Lading of date New York Feb. 20th, 1862, for Fort Pickens, verbally contracted to tray $2,500, noted in Bill Lading, and eight fair working days to discharge & $37.12 demurrage for each day detained thereafter. That Brig reported off Ft. Pickens 19th March and commenced unloading as soon as practicable. That on the 3d April Quarter Master had received all of the cargo except 1,000 shells—227 Bbls Beef, and 17 Bbls Pork, when he quit & commenced unloading the steamer Philadelphia part of whose cargo he put in the Brig. That on the 5th April it commenced storming so hard that goods could not be landed," and the Brig was finally wrecked with goods on board.

The receipt of the Quarter Master at Ft. Pickens for all cargo except 1,000 shells, 227 Bbls Beef & 17 Bbls pork appears on the Bill Lading,

also his certificate that Brig is entitled to nine days demurrage. There also appears Certificate of Quarter Master of date April 23rd, 1862, countersigned by Commanding General, setting forth facts detailed above regarding arrival, unloading & wrecking of the Brig, except it states that all her cargo was landed "except 1,000 shells, 230 bbls beef & 19 Bbls pork" thus making a discrepancy between it and the receipt of 3 bbls beef and 2 bbls pork.

On this state of the case the Brig claims full freight & 9 days demurrage. Without passing upon the sufficiency of the proof in regard to the contract for freight and demurrage which appears to be noted in the Bill of Lading produced & which is signed only by the Master of the Brig, I will pass to the consideration of the points presented by the case.

If it be admitted that the Brig arrived at the place (near the dock or beach) where she was to unload on the 19th March, and waiting the time specified for discharge, delivered her cargo, except a small balance and was in good faith ready & able to deliver the balance, but was prevented by the acts of the Quarter Master, who also on authority of Commanding General, put other goods on board of her as stated, it is my opinion that the transaction amounted to a delivery and acceptance of the goods on board, & that the Brig was entitled to full freight.

But there is a question whether further proof is not also required to show that the goods not actually received by the Quarter Master, were still on board, and were in fact, so constructively delivered. It will be perceived that the Quarter-

master receipt of all "except 1000 shells, 227 Bbls beef, & 17 Bbls pork" does not establish the fact, that those goods still remained on board.

Besides—although the Brig was wrecked, it nowhere appears that the balance of the cargo was lost.

In regard to the claim for demurrage, certificates of Quarter Master in regard to demurrage and damage, if taken as advisory evidence, should at least be confined to a clear and explicit statement of facts and not conclusions.

If it be assumed that the Brig arrived at the place (wharf or beach) on the 19th March, when it stated she reported "off Ft. Pickens" and that ten lay days commenced to run from then, it would seem that Government had until the 29th to receive the cargo—excluding Sunday.

Commencing then with the 29th, and give to and including the 4th April as demurrage, the weather from & including the 5th being too stormy to unload, and it would give but seven instead of *nine* days for demurrage. This may be correct or not, according to the *facts* which are not made fully to appear. In order to decide the amount of demurrage, if any, it would be well to have proof of the time she actually came up to the place of unloading, the state of the weather, the readiness and ability of the Brig to discharge—whether she contributed in any manner to the delay or whether she consented to it with a view to the demurrage etc.

For these reasons I return the papers that further may be supplied on the points designated.

Very respectfully etc.,

(S) J. MADISON CUTTS, *Comptr.*

Brig Genl. M. C. MEIGS, *Quarter Master Genl.*

[COPY]

ENCLOSURE NO. 19

TREASURY DEPARTMENT,
OFFICE OF THE SECOND COMPTROLLER,
Washington, D. C., June 27, 1893.

Hon. DANIEL S. LAMONT,
Secretary of War.

SIR: I have the honor to acknowledge the receipt, by reference from your Department, of the letter addressed to you by the Quartermaster-General June 15, 1893, requesting the submission, for my decision, of three questions relating to the rendition of public accounts.

The three questions are as follows:

First: Under the decision published in General Orders No. 32, A. G. O., 1893, are bills for the various articles of quartermaster supplies which are purchased and delivered under formal written contracts, required to be attached to the vouchers?

Second: Under the decision, are bills for services under formal written contracts required to be filed with the vouchers?

Third: Under the decision, are bills for transportation service performed under public tariffs,

and for telegraphic service where the rates are fixed by the Postmaster-General, required to be filed with the vouchers?

My decision upon the first and second questions is that the vouchers referred to in said decision which are filed in support of payments under formal written contracts, need not be accompanied by bills, in cases where the quantities delivered or the amounts due are determined by duly authorized inspectors and their certificates as to the facts determined are filed with the vouchers to which they pertain.

My decision upon the third question is that the vouchers referred to in said decision which are filed in support of payments for transportation service performed under public tariffs, need not be accompanied by bills, in cases where duly accomplished bills of lading or transportation requests, as the case may be, are filed with the vouchers to which they pertain, and that all vouchers referred to in said decision which are filed in support of payments for telegraphic service where the rates are fixed by the Postmaster-General, need not be accompanied by bills other than those required independently of said decision.

I have the honor to be, Very respectfully,

(S) C. H. MANSUR,
Second Comptroller.

[COPY]

ENCLOSURE NO. 20

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,

Washington, March 6, 1901.

The Honorable,
The SECRETARY OF WAR.

SIR: By your direction I have received a letter, dated February 23, 1901, addressed to the Quartermaster General by A. S. Kimball, Assistant Quartermaster General, in which the latter submits the question as to whether the Quartermaster's Department is authorized to make prepayment of freight charges on shipments for and on behalf of the United States where the regulations of the carriers require such prepayment.

It appears in said letter that because of the manner in which the business has to be done, through a third party, the cost of the freight exceeds what it would be if the same could be prepaid.

Under date of March 1, the Quartermaster General requests—

> information whether under the decision of November 11, 1896 (3 Comp. Dec. 181), officers of the Quartermaster's Department may pay freight charges on shipments made by them by rail or water *in advance of delivery at destination* in order to secure *cheaper rates* for such shipments. If the decision is not applicable to shipments by

officers of the Quartermaster's Department, it is not the object of this communication to request that payments of freight charges *in advance be sanctioned,* as it will materially interfere with the accountability of officers for stores lost or damaged in transit, for which the carriers are now held rigidly responsible.

In the decision of November 11, 1896, *supra,* it was said, quoting from the syllabus:

> A disbursing officer will be allowed credit for freight charges prepaid upon shipments to a foreign country, without furnishing proof of delivery of the goods at destination, when he supports his voucher therefor with the bill of lading issued by the carrier and his certificate, or other evidence, that prepayment was necessary to secure the transportation.

In section 876, Digest of Decisions of the Second Comptroller, Vol. 1, it is said:

> No claim for freight can be admitted until it shall be made to appear that the contract has been fulfilled on the part of the owners; that is, until the goods have been delivered in good order and condition as when shipped, or injured by the perils of the sea.

On March 29, 1898 (4 Comp. Dec., 544), the Comptroller, having before him a question submitted by the Secretary of the Treasury in regard to the prepayment of express charges, after quoting section 3648, Revised Statutes, said, quoting from the syllabus:

> The prepayment to an express company of charges for transportation is prohibited

by section 3648, Revised Statutes, which provides that "no advance of public money shall be made in any case whatever, and in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the services rendered or of the articles delivered previously to such payment."

While this later decision does not in express terms overrule the decision of the Assistant Comptroller of November 11, 1896, *supra,* it does overrule it in fact, and adds at the close of the decision the following:

> The rules or customs of railroad, express, or other private companies, however reasonable, can not supersede an express provision of a statute, and if those companies decline to render service except upon such terms the inconvenience must be borne until the statute is modified or repealed.

The subject was again considered in 7 Comp. Dec., 262, and it was therein held, quoting from the syllabus:

> Payment in August, 1900, for magazines to be delivered monthly during the fiscal year 1901, is prohibited by section 3648, Revised Statutes, which provides that no advance of public money shall be made in any case whatever.

In conclusion I will add that so long as the provisions of section 3648, Revised Statutes, stand

unrepealed, I see no way in which prepayment of freight charges can be authorized.

The enclosures are herewith returned.

Respectfully yours,

(S) L. P. MITCHELL,
Assistant Comptroller.

[COPY]

Appeal No. 8184.

ENCLOSURE NO. 21

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,

December 12, 1902.

The Pacific Mail Steamship Company applied, November 20, 1902, for a rehearing on a claim disallowed by the Auditor for the War Department in settlement No. 16957, dated September 25, 1901, said action being affirmed by this office, September 23, 1902.

The company claimed $154.95 as refundment of the value of commissary stores found short on delivery of invoice of stores shipped from San Francisco, Cal., June 30, 1899, by steamship *Rio de Janeiro* billed through to Manila, P. I., on Voyage #75, and freight thereon $12.46, amounting in all to $167.41; it appears that the value of the stores was charged to and paid by the company in order to secure payment for the services rendered and that the freight charges thereon were deducted by the Depot Quartermaster at San Francisco, in making settlement of the transportation charges. (See voucher #3, Abstract B, Money accounts of Captain O. F.

Long, Quartermaster, U. S. Army, for September 1900, fiscal year 1900.)

Said claim was disallowed by the Auditor whose action was affirmed by this office as above stated. The company now asks a reconsideration by this office and an allowance of the amount heretofore disallowed.

It appears by affidavits that the stores received by the steamship *Rio de Janeiro,* Voyage #75, consigned to the United States Depot Quartermaster at Manila, consisted of 7,500 packages, which were all delivered to the steamship *Yuensang,* of the Indo-China Steam Navigation Company at Hong Kong, to be forwarded to Manila; the master of the steamship *Yuensang* makes affidavit October 12, 1901, that all of said 7,500 packages were taken delivery of at Manila at ship's tackles and that receipts showing complete and sound delivery were obtained; and that said receipts have since gone astray and cannot be found. Messrs. Jardine, Matheson & Co., General Managers of the Indo-China Steam Navigation Co., states that said receipts on examination by them proved complete and sound delivery.

The agent of the Pacific Mail Steamship Company at Hong Kong, under date of January 1, 1901, states that he had inspected the said receipts which consist of the delivery order books and that the cargo is signed for by the men in charge of the Government lighters, they being in all cases Spaniards. He further states that these receipts show that the full number of packages were delivered to the lighters in good order and condition.

It appears to have been the custom at that time for freight to be so received; on checking the

freight in the Government warehouse, the shortage was discovered; the company claims that the loss occurred between the delivery to the lightermen and the Government warehouse, and that delivery having been made in full to said lightermen in the employ of the United States, the said loss should not be charged to the transportation company.

The claimant company, by its Vice President and General Manager under date of November 14, 1902, states that it did not receive information of the shortage in time to submit proofs of complete delivery at ship's tackles to the Board of Survey which held them responsible for the said loss. He further states:

> The first intimation received at the General Offices of the Pacific Mail S. S. Co. that the Government check had developed a shortage in this consignment per *Rio* was when the Government bill of lading was received in San Francisco on November 1, 1899, per S. S. *China*. Even then we were not aware that a Board of Survey had been held to fix the responsibility for the shortage and had decided that the Pacific Mail S. S. Co. was to be held responsible for same. On November 2, 1899, the day following the receipt of the certified copy of Government bill of lading we rendered bill to Col. Long, the Depot Quartermaster at San Francisco, for the full amount of freight charges on shipment per *Rio* Voy. 75, amounting to $5,246.75. As the bill was still unpaid in February, 1900, the matter was taken up with Col. Long to ascertain the cause of the delay and he informed us on February 10, 1900, the delay in settlement was caused owing to the fact that

report of the Board of Survey which acted in relation to this shortage was missing from his files. It was not until some time in May, 1900, as I remember now, that we were officially advised we were to be held responsible for the shortage developed by the Government check and our records show that on May 21, 1900, the Pacific Mail S. S. Co. paid over to Col. Long the sum of $154.95, this being the value of the Government stores for the loss of which, we were informed, the Board of Survey had held we were responsible. In paying this sum we did so not because we acknowledged our responsibility for the shortage which was found to exist after the consignment had reached the Government store houses at Manila, but that we might not be longer kept out of $5,246.75 freight money earned on the shipment in question, some eight months previous, the freight having been delivered in Manila about September 1, 1899. However, even after paying the amount claimed by the Government we were unable to collect our money and it was not until September 15, 1900, that the Government paid our bill after deducting therefrom a further sum of $12.46, the freight on the stores claimed to have been short. Therefore over a year elapsed between the time the freight was delivered at Manila and the date on which the freight bill was paid by the Government.

The delay in obtaining information as to the action of the Board of Survey and obtaining a settlement of freight bill by the Government will in a great measure explain who so long a time elapsed between the time of the delivery of the freight and the date on which we took steps towards

obtaining a reconsideration of the action taken by the Board of Survey, which delay the Hon. Comptroller of the Treasury refers to.

In regard to the receipts obtained by the *Yuensang* from the parties in charge of the Government lighters at Manila at the time this freight was delivered to said lighters: While it is unfortunate that these receipts cannot be located and produced at the present time there can be no question raised as to their actually having been received by the *Yuensang*. These receipts were exhibited to our Agent at Hong Kong, Mr. J. S. Van Buren. (See his letter to Claim Department, P. M. S. S. Co., dated January 1, 1901, original of which you have.) Capt. P. H. Rolfe, Master of the *Yuensang*, also made affidavit before U. S. Consul General Rublee at Hong Kong on October 12, 1901, to the effect that such receipts, showing complete and sound delivery to Government representatives at ship's tackles, Manila, were obtained by him, and that these receipts were produced for the inspection of Messrs. Jardine, Matheson & Co. (the Agents of the Indo-China S. S. Co., Managing Owners of the *Yuensang*), some time in June, 1900, but had since gone astray and could not be located. (The original of this affidavit has been sent you.)

In regard to delay in our presenting the original Government bill of lading at Manila, covering the *Rio* shipment for certification, I enclose herewith original letter and enclosure from Mr. Alex. Center, General Agent Pacific Mail S. S. Co.,

dated San Francisco, October 21, 1902, #4495, which shows fully the reasons for this delay and that every effort was made by this Company to get the bill of lading to Manila and into the hands of the Government's representatives at the earliest possible date.

It appears that the Board of Survey which held the claimant company liable for the loss, relieved the steamship *Bidston Hill* from responsibility for losses from her cargo upon the sworn statement of the captain that his cargo was intact until the Quartermaster's Department began to unload his vessel.

The Board in its report stated that the nature of the transportation, necessary because no other can be obtained, between a ship in the Bay and the Government storehouses, is such that losses are unavoidable.

It seems probable that the Board would have also relieved the claimant company from the loss in question, upon the evidence now presented to this office, and which, no doubt would have been presented to said Board had opportunity been given.

Upon the new and material evidence presented the case is hereby reopened and the amount of $167.41 heretofore disallowed is hereby allowed.

The Auditor will state an account accordingly.

(Signed) R. J. TRACEWELL,
Comptroller.

[COPY]

ENCLOSURE NO. 22

Appeal No. 17812.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
October 29, 1909.

The United Fruit Company, of New Orleans, La., appealed October 4, 1909, from so much of the action of the Auditor for the Navy Department in settlement No. 9335, dated June 16, 1909, as deducted from the amount of $150 otherwise allowed therein the following item:

> On account of lost freight shipped by Adler & Co., New Orleans, La., for U. S. S. *Dubuque*, and never delivered to that ship or any other ship in the Navy, $99.01.

Said item is subitemized by Adler & Co. as follows:

3350 lbs. Potatoes, Irish (19 bbl.)		$67.00
620 lbs. Onions (4 bbl.)		12.40
Drayage	$1.35	
Insurance	.54	
Freight	17.72	
		19.61
		$99.01

Paymaster Kenneth C. McIntosh, of the U. S. S. *Dubuque*, then at Puerto Cortez, Honduras, cabled Adler & Co., Inc., at New Orleans, La., October 22, 1907, as follows:

> Ship Dubuque Portocortes Honduras United Fruit Steamer Thursday Twenty-fourth 3000 potatoes 400 onions.

Adler & Co., October 23, 1907, delivered to claimant 19 bbls. potatoes and 4 bbls. onions, to be transported by its steamer *Bluefields*, then

in New Orleans, to Puerto Cortez, and there delivered to the U. S. S. *Dubuque,* care of American Consul, and paid freight thereon amounting to $17.72, the payment of freight by the shipper being required by the claimant. (See Bill of Lading, No. 844, issued by claimant October 23, 1907, acknowledging receipt of goods from Adler & Co. for delivery as aforesaid.)

The Bureau of Supplies and Accounts, Navy Department, reports, June 18, 1909, that the supplies in question were never delivered to the *Dubuque.* A Board of Survey ordered by the Commanding Officer of the *Dubuque* February 17, 1909, found that the supplies had never been received by the *Dubuque,* nor by ~~the *Marietta*~~ or *Paducah,* the only other United States ships in Honduran waters at the time of the arrival of the *Bluefields* at Puerto Cortez, and that the U. S. Consul at Puerto Cortez, who was also wharf commissioner, had no record of delivery at that port, and fixed the responsibility for the nondelivery of the supplies upon the claimant. The claimant has no receipts from any one on behalf of the United States showing the delivery of the supplies.

Payment has been made to Adler & Company by Paymaster Kenneth C. McIntosh, of the *Dubuque,* of their bill for supplies, amounting to $99.01, itemized *supra,* by check No. 415441, dated February 26, 1909, and the amount so paid has been deducted by the Auditor from amount otherwise due the claimant, as representing the damage suffered by the United States on account of the nondelivery by it of the supplies for the United States delivered by Adler & Co. to it as

common carriers for transportation and delivery to the *Dubuque*.

Claimant does not deny the receipt by it from Adler & Co. of the supplies, nor the prepayment of freight by Adler & Co. thereon, but contends that it did not understand that the Government had any interest in the shipment, and that it actually delivered the supplies to the *Paducah* for delivery to the *Dubuque*, and invites attention to the provisions of section 3648 of the Revised Statutes.

The issuance by claimant of a bill of lading, acknowledging the receipt of the supplies from Adler & Co. and agreeing to deliver them to the U. S. S. *Dubuque*, Care of American Consul, Puerto Cortez, and its statement that it actually delivered them to a vessel of the United States, negative its contention that it did not understand that the Government had any interest in the shipment. The mere statement of the claimant to the effect that it delivered the supplies to the United States, in the absence of the submission by it of any proof of actual delivery, is insufficient to controvert the findings of the Board of Survey and of the Navy Department to the effect that the supplies were never delivered to the United States by the claimant.

Section 3648 of the Revised Statutes referred to by the claimant is a statute prohibiting payment for articles prior to delivery. In so far as payment by the United States to Adler & Co. is concerned delivery of the supplies by them to the claimant for carriage to a vessel of the United States was as between them and the United States delivery to the United States and vested

the title in said supplies in the United States *United States* v. *Andrews,* 207 U. S. 229, 240; *Andrews* v. *United States,* 41 Ct. Cl., 48, 59; *Grove* v. *Brien, et al.,* 8 How., 439; *Easton* v. *George Wostenholm & Son,* 137 Fed. Rep., 533 *Lawrence et al.* v. *Minturn,* 17 How., 107; *Dannemiller, Appellants* v. *Kirkpatrick,* 201 Pa. St., 218; *Magruder & Bro.* v. *Gage,* 33 Md., 344, 350; *Hamilton* v. *Brewing Co.,* 129 Iowa, 179; *Equitable Mfg. Co.* v. *Engelke,* 39 N. J. L., 567; *Althouse* v. *McMillen,* 132 Mich., 145; *Hague* v. *Porter,* 3 Hill's Rep. (N. Y.), 141; *Dr. A. P. Sawyer Medicine Co.* v. *Johnson,* 178 Mass. 277; *Hill* v. *Gayle & Bower,* 1 Ala., 277; 15 Comp. Dec., 170), notwithstanding the prepayment of freight by Adler & Co. in compliance with a general requirement of the claimant in its printed bills of lading to the effect that shippers shall pay the freight (*United States* v. *Andrews & Co., supra; Dr. A. P. Sawyer Medicine Co.* v. *Johnson, supra; Easton* v. *George Westenholm & Son, supra;* 8 Durnford & East's Rep., 334). Payment was not therefore made by the United States to Adler & Co. prior to delivery by Adler & Co. to the United States of the supplies for which payment was made.

No liability attached to Adler & Co. because of any negligence of the claimant in delivering the supplies, the United States having designated the claimant as the carrier by which the supplies were to be transported to it (*Morris* v. *Warlick,* 118 Ga., 422). The United States having directed Adler & Co. to deliver the supplies to the claimant, and the claimant having accepted the supplies and agreed to deliver them to the United

States, the claimant became the agent of the United States for the transportation of such supplies (*United States* v. *Andrews, supra; Althouse* v. *McMillan,* 132 Mich., 147; *Dr. A. P. Sawyer Medicine Co.* v. *Johnson,* 178 Mass., 377), and liable to the United States for the cost of such supplies, including freight, drayage, and insurance charges, if lost through its negligence while in its custody. (*The Scotland,* 105 U. S., 24; *Steamship Aleppe,* 7 Ben., U. S., 120; *The Umbria,* 59 Fed. Rep., 489; *The Beatrice Havener,* 50 Fed. Rep., 232; *The Menominee,* 125 Fed. Rep., 530. See also *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S., 441; *The Guildhall,* 59 Fed. Rep., 799; act of February 13, 1893, 27 Stat., 445.)

The Auditor's action in deducting said item is affirmed. (7 Comp. Dec., 65.) A certificate of no difference as to such item will issue.

(Signed) L. P. MITCHELL,
Assistant Comptroller.

[COPY]

ENCLOSURE NO. 23

Appeal #24874.

EWM–8–D, TREASURY DEPARTMENT,
Washington, September 23, 1915.

The New York and Cuba Mail Steamship Company applied July 27, 1915, for revision of the settlement by the Auditor for the Navy Department, No. 8071, dated June 28, 1915, of claims for freight and reimbursement for deductions, amounting to $497.39.

The Auditor made certain disallowances which he explains as follows:

The differences are as follows:

Total amount claimed	$497.39
Allowed	474.20
Disallowed	23.19

thus explained:

Bill 1287, value of 1 bale of dry goods missing on delivery shipped on B/L No. 5799, Nov. 5, 1914, and freight charges	15.53
Bill No. 1440, Bill of Lading short accomplished 1 Drum of Paint, and other articles, value of paint being chargeable to the company	6.10
Bill No. 1415, difference in freight on 21 cu. ft. towels, claimed Merchandise rate, allowed tariff rate applicable to "Dry Goods," as explained in letter to you dated April 5, from the Assistant to the Bureau, Navy Department, difference	.84
Bill No. 1430, overcharge on item of 612 lbs. Stove Castings, rated 3rd class, instead of 5th class, the latter appearing proper rating as Castings N. O. S.	.72
	23.19

The appeal is from the first two disallowances. The first of these is claim for reimbursement of $15.53, which had been deducted by the Bureau of Supplies and Accounts in the payment of freight bills, for a bale of dry goods weighing 43 pounds, part of a shipment of 34 packages made November 5, 1914, on appellant's steamship *Morro Castle* from New York under Navy Bill of Lading No. 5799, and consigned to the U. S. S. *Petrel* at Vera Cruz, Mexico, or "in the absence of the *Petrel* to be delivered to any other U. S. ship present." The appellant company's officers state that the shipment was delivered to the "Vera Cruz Terminal Company" on November 13, 1914, and the bill of lading shows that it was delivered on board the U. S. S. *Minnesota,* December 15, 1914, with a shortage. The Squadron Paymaster, Detached Squadron, Atlantic Fleet, for Com-

manding Officer, U. S. S. *Petrel,* acknowledged the delivery on the *Minnesota* and endorsed the shortage as follows:

> 1 bale dry goods weighing 43 pounds not delivered.

In reply to a request of the Bureau of Supplies and Accounts for a copy of the receipt held by the company, the Acting General Manager stated May 13, 1915—

> I regret that we are not in possession of that document at this end but enclose herein a copy of a letter received from Mr. T. W. Wuerpel, Acting Superintendent of the Compania Terminal de Veracruz, S. A., dated December 28th, 1914, * * *.

The letter enclosed is as follows:

> COMPANIA TERMINAL DE VERACRUZ, S. A.,
> *Veracruz, Dec. 28, 1914.*
>
> Capt. A. ROBERTSON,
> *Agent Ward Line, City.*
>
> DEAR SIR: Replying to your favor of the 17th instant reference R/C ex Morro Castle 256, Nov. 13/14, please be informed that shipment covered by bill of lading #78 was delivered to and signed for without exceptions.
>
> Yours truly,
>
> T. W. WUERPEL,
> *Acting Superintendent.*

I understand that the signing without exception refers to the receipt by the Terminal Company. This company was not the agent of the United States.

By a letter of August 10, 1915, this office requested information of the company as follows:

> * * * in your letter of February 20, 1915, signed by H. E. Cabaud, General Agent, to the Bureau of Supplies and Accounts, Navy Department, you state:
>
> "Our investigation shows that your ship took delivery from the Vera Cruz Terminal Company at Vera Cruz and signed receipt without exception."
>
> Will you please send me the receipt referred to for use in revision of the Auditor's settlement. * * *.

The copy furnished is of a receipt, not from the Vera Cruz Terminal Company, but from the Mexican Railroad Company, and seems to cover the shipment of which the bale of dry goods was a part. There is nothing in the paper showing that the lost goods were delivered to the *Minnesota* or any other United States vessel.

A survey was made by order of the commanding officer of the *Petrel* as to the missing bale and the report was:

> Missing from shipment. Responsibility: *Morro Castle.*

All this evidence is quite sufficient to show that the bale of dry goods in question was not delivered to the *Petrel* or other vessel of the United States or to any agent of the United States.

The Assistant General Manager of the appellant company by his letter of appeal contends that notwithstanding the non-delivery on board

the *Minnesota,* the company is not responsible because—

> It is of common knowledge that our bill of lading properly provides a delivery will be made at port of destination at time of release of cargo from ship's slings at shipside.

However that may be and what effect such stipulation might have, it is not necessary to be considered as the shipment, as before stated, was made on Government or Navy bill of lading which was received, signed, and treated as a bill of lading by the steamship company. This reads, in part—

> Received from E. C. Tobey, Paymaster, U. S. N., General Storekeeper, by the Ward Line Stmr. *Morro Castle* the public property described below, in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof, from New York to Vera Cruz, Mexico, by said company and its connections, there to be delivered in like good order and condition to commanding officer, U. S. S. *Petrel,* Vera Cruz, Mexico * * *. In the absence of the U. S. S. *Petrel,* this shipment to be delivered to any other U. S. ship present * * *.

There is no such provision in the bill of lading similar to that referred to as contained in the company's ordinary bill of lading relieving of responsibility "at the time of release of cargo from ship's slings at shipside."

From all the evidence submitted I am of opinion that the Auditor's disallowance of this item is correct and it is affirmed.

The other item appealed from was a claim for reimbursement of $6.10 which was deducted by the Bureau of Supplies and Accounts in the payment of freight bills, for one drum of paint part of a shipment of 147 packages made March 4, 1915, on the S. S. *Pathfinder* from New York to Tampico, Mexico, consigned to the commanding officer of the U. S. S. *Petrel* under Navy bill of lading No. 12780.

The following notation was made on the bill of lading on receipt of the goods at New York:

> 1 Drum Paint short in dispute, if found on board to be delivered.

The drum of paint was not received at Tampico but was excepted on the bill of lading. No other evidence is submitted as to the delivery of the paint in question to the appellant for shipment except the certificate of the General Storekeeper on the bill of lading, and as the notation of the shortage was at once made on the said bill at New York and the drum of paint was not delivered at destination its shipment seems doubtful. I do not think the carrier company should be charged.

The action of the Auditor in disallowing this item is therefore disaffirmed and a difference is found from his settlement in favor of the appellant of six dollars and ten cents ($6.10). A certificate will be issued accordingly.

(Signed) W. W. WARWICK,
Comptroller.

[COPY]

ENCLOSURE NO. 24

Appeal No. 12863

CCM 6, TREASURY DEPARTMENT,
OFFICE OF CONTROLLER OF THE TREASURY,
October 31, 1906.

Barber and Company, Incorporated, of New York, N. Y., appealed October 25, 1906, from the action of the Auditor for the War Department in his settlement No. 33079, dated September 13, 1906, wherein he disallowed the sum of $174.28 in the claim of said company. The reasons for such disallowance are stated by the Auditor in his certificate as follows:

> The claim for freight charges amounting to $482.34, on original bill of lading No. 5588, covering a shipment from New York City to Manila, P. I., December 16, 1905, without deduction for the loss of 1 box, containing 100 bottles, of Hydrocyanic Acid and 12 casks of Calcium Carbide.
>
> The box of acid and the casks of carbide were stored on deck and the bill of lading provided that shipments were carried on deck at the shipper's risk.
>
> The only evidence as to the cause of the loss is the following statement of the Captain of the Steamship:
>
> "We had very bad weather passage across the Atlantic; a succession of wind the whole way over. It was at the worst on Christmas night until 8 P. M. We shipped a tremendous sea and washed a lot of the acids overboard. The steering gear got jammed with them and nearly broached the ship, so we were obliged to

let the rest go as well. The bad weather continued right on to St. Vincent."

By direction of the Quartermaster General this case was referred to the Controller of the Treasury for his decision as to the proper basis of settlement. The Controller, June 6, 1906, authorized the Depot Quartermaster New York City, to pay the claim after deducting the value of the property lost and the freight on the same. Barber & Co., refused to accept payment on that basis and the claim was forwarded to this office for settlement.

No new evidence that the "deck cargo" was properly stored and adequately protected in its exposed condition, as required by the Controller, was presented, except the Certificate of Loading of the Surveyor of the Board of Underwriters of New York, dated December 16, 1905, which is not considered by this office to be conclusive of the question at issue, and there being reason for immediate settlement, such settlement is made under the decision of June 6, 1906, above mentioned.

Amount claimed	$428.34
Amount claimed	308.06
Amount disallowed	174.28

Arrived at as follows:

Value of Hydrocyanic Acid lost	$12.00
Freight on Hydrocyanic Acid lost	.28
Value of Calcium Carbide lost	120.00
Freight on Calcium Carbide lost	42.00
	174.28

This case was once before considered by this office in a decision addressed to the Deputy Quartermaster General of the Army, dated June 6, 1906 (See 12 Con. Dec., 746). At that time the record transmitted to me contained no evidence

as to the manner in which the stores were loaded on the vessel nor was there any evidence to disprove the presumption of negligence or careless loading on the part of said company. (See 51 Fed. Rep., 605; 15 Fed. Rep. 686; 106 Fed. Rep., 319.)

The record now before me on this appeal contains the certificate of the Surveyor for the Bureau of Inspection of the Board of Underwriters of New York that the S. S. *Shimosa* had "completed her loading at this port, under this inspection, and has conformed to all the rules of the Board of Underwriters of New York in relation thereto."

The following affidavit is also now submitted:

> Charles M. Tiffany being duly sworn, says: I am Superintendent Stevedore for the Atlantic Stevedoring Company, the concern that loaded and stowed on the steamship Shimosa in December 1905, some boxes of hydrocyanic acid and casks of calcium carbide.
>
> These boxes and casks were in the ordinary form of packages containing similar merchandise such as have come frequently under my notice for a number of years.
>
> The boxes and casks were stowed on the deck forward and also aft. They were secured by means of lumber between the boxes and casks to keep them from shifting as the ship rolled and also with rope lashing on top to keep them from being dislodged if a sea washed on board.
>
> I have had twenty years' experience in stowing deck cargoes. The stowing of this cargo was done under my direct supervision. I know that when the stowing of the casks and boxes was completed that they

were well, carefully and securely stowed and lashed so that they would, according to all reasonable foresight, carry safely in any ordinary weather that might be anticipated.

It is the usual practice to stow such cargo upon the deck. Indeed, it is not considered a safe nor prudent thing to stow such cargo under deck where it might possibly come in contact with other cargo. I have frequently seen shipments of similar cargo leave this port consigned to the Government stowed on deck and in a similar manner to that in which the cargo in this instance was stowed.

There was not, in my opinion, any reasonable precaution known to experienced stevedores that could have been taken in the stowing of this cargo to have secured any greater safety than that actually obtained.

The Atlantic Stevedoring Company stows on vessels at the port of New York every year cargo of more than a million tons. All this stowing is done under my supervision.

Sworn to before me this 23rd day of October 1906.

CHAS. M. TIFFANY.
CHARLES R. HICKOK,
Notary Public, New York County.

This affidavit was not before the Auditor when he disallowed the claim.

This detailed explanation by Mr. Tiffany is, to my mind, sufficient to exonerate the company from the charge or presumption of having loaded the cargo negligently or carelessly. Since, therefore, it was properly loaded and was subsequently washed overboard and lost, the loss must be re-

garded as occasioned by peril of the sea for which Barber and Company are not liable.

The action of the Auditor is therefore reversed, upon the new evidence now furnished, and a certificate of difference in favor of Barber & Co. will herewith issue for $174.28.

(Signed) R. J. TRACEWELL,
Controller.

[COPY]

ENCLOSURE NO. 25

Appeal No. 24874.

TREASURY DEPARTMENT,
Washington, January 8, 1916.

The New York and Cuba Mail Steamship Company applied October 14, 1915, for reconsideration of the decision of this office of September 23, 1915, on appeal No. 24874, affirming the action of the Auditor for the Navy Department in disallowing, by settlement No. 8071, dated June 28, 1915, $15.53, the value of one bale of dry goods, and freight thereon short delivered in shipment by appellant's steamship *Morro Castle* from New York under Navy Bill of Lading No. 5799, consigned to the U. S. S. *Petrel* at Vera Cruz, Mexico, or "in the absence of the Petrel to be delivered to any other U. S. ship present."

The shipment was delivered to the "Vera Cruz Terminal Company" on November 13, 1914, and the Squadron Pay Officer, who had the duty of looking after shipments, states that the consign-

ment was removed to the U. S. S. *Minnesota* the following day, when the shortage was discovered. In the decision of September 23 it was held that the Vera Cruz Terminal Company was not the agent of the United States to receive the shipment. It was said—

> All this evidence is quite sufficient to show that the bale of dry goods in question was not delivered to the *Petrel* or other vessel of the United States.

In the letter requesting reconsideration of the decision it is said:

> A very important factor has evidently not been given proper consideration; that is, the New York and Cuba Steamship Company, as carrier, is compelled by the Mexican Government to make a delivery of all cargo at Vera Cruz at a place designated by the Mexican Government port officials. The place designated is the wharf of the Vera Cruz Terminal Company and is known as the Profirio Wharf.

In the appellant's letter of July 30, 1915, requesting revision of the Auditor's settlement disallowing the item in question no statement was made, as now appearing, that the Mexican laws required the delivery to the Vera Cruz Terminal Company.

Such being the case, and I do not question the credibility of the evidence given by the appellant's statement, I am of opinion that the carrier company is relieved of responsibility for

shortages occurring after delivery of the goods to the Vera Cruz Terminal Company, that company having receipted in full for the consignment. The relief of the carrier from responsibility under such circumstances is recognized by the courts. It was held in *Herbst* v. *The Asiatic Prince* (97 Fed., 343), quoting from the syllabus:

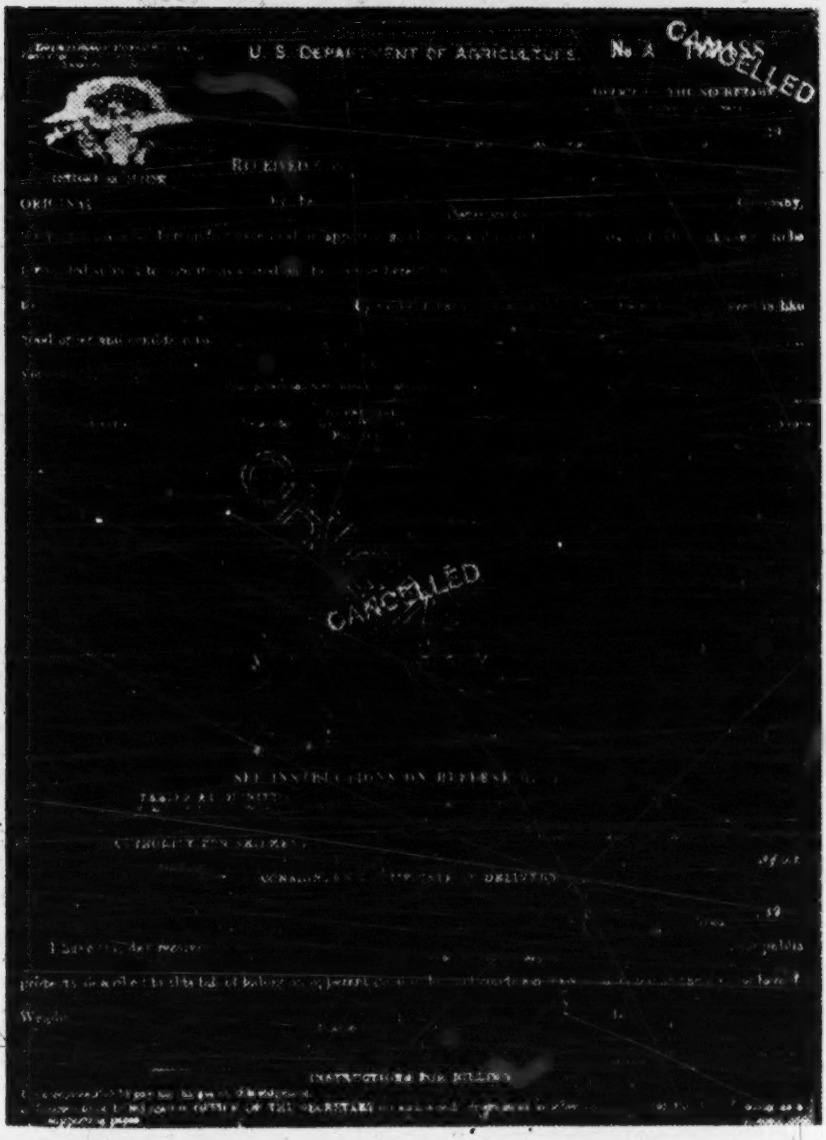
> A ship's delivery of a consignment of dutiable goods to the customs authorities, being required by the law and usage of the place, delivery to the proper party thereafter devolving on such authorities, is a good delivery as between the shipper and carrier.

This was affirmed by the Circuit Court of Appeals (108 Fed., 287).

Upon this rehearing and reconsideration the Auditor's disallowance of the item of $15.53 in question is disaffirmed and a further difference from the Auditor's settlement is found in favor of the appellant of fifteen dollars and fifty-three cents ($15.53). A certificate will be issued accordingly.

(S) W. W. WARWICK,
Comptroller.

ENCLOSURE NO. 26



[Reverse]

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than provided for shipments made upon the uniform or standard bill of lading or standard receipts.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

INSTRUCTIONS

1. Erasures, interlineations, or alterations in bills of lading must be authenticated and explained by the person making them.

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

3. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

4. In no case will a second bill of lading be issued for any shipment, nor will a bill of lading be issued after the transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier will furnish with its freight bill, to the officer charged with the settlement of the account, a certificate, in duplicate, certifying over the signature of the proper officer of the carrier the weight and description of the property transported, giving number, date, and place of issue of the bill of lading therefor, that said bill of lading is not in its possession or can not be located, and that if same should later be found it will be surrendered at once to the proper officer of the United States and no claim made thereon.

On receipt of such certificate of loss of bill of lading the administrative officer will, if his records show that payment of the transportation charges has not been made, call upon the issuing officer to furnish a certificate of shipment showing the same information as given on the bill of lading; this certificate to be forwarded by the issuing officer to

the consignee, who will complete the certificate showing whether the property was received in good order and condition and the weight thereof on receipt. This completed certificate will be returned to the administrative officer and settlement will be made on the certificate of shipment in lieu of the original bill of lading. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the auditor for the department concerned and filed with the original voucher.

5. To insure prompt delivery of property, in the absence of the bill of lading, the consignee may give to the carrier a receipt for the property actually delivered, which will state that it is given because the bill of lading has not come to hand. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be indorsed with reference to the bill of lading or certificate sufficient to identify the same, and both papers attached and forwarded with the claim for payment thereon.

6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall when practicable, be noted on the bill of lading before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

7. Bills must be submitted by the general officers of carriers, and on forms furnished by the Government, to be obtained from the Public Printer, Washington, D. C.

ADMINISTRATIVE DIRECTIONS

1. Government property will be transported on the prescribed form of Government Bill of Lading (original, memorandum, and shipping order), which will be identified by serial numbers.

2. Through bills of lading will be issued in all instances between initial and ultimate points, except when rates more advantageous to the Government may be otherwise secured.

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Bills of lading must describe shipments of articles by their commercial names, giving separately such weights, dimensions, and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery in case of loss or damage.

6. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat., 111.)

7. If the number of articles to be shipped be too great for the blank form (original, memorandum, and shipping order), extra sheets of the prescribed form should be used, and so attached and designated as to form but one bill of lading, under one number.

8. A voucher when submitted for settlement shall cover charges to one office or service only. The name of the office is inserted at the foot of the bill of lading. Correspondence regarding transportation accounts shall be addressed to the particular office or service and

reference made to the serial numbers of the Government bills of lading included in the company's bill.

REPORT OF LOSS, DAMAGE, OR SHRINKAGE

Explanation regarding loss, damage, or shrinkage to be made by consignee, who will state all the facts available concerning the nature or extent of the loss, damage, or shrinkage, and how it occurred.

The within shipment was received with the following loss, damage, or shrinkage:

[COPY]

ENCLOSURE NO. 27

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, Sep. 9, 1930.

The Munson Steamship Line applied March 19, 1930 for review of settlement T–68486, March 10, 1930 of bill Mystic 8–SB.PH–SF.B/L 53, wherein $1.24 was disallowed from freight charge and $21.12 was deducted as the value of loss in a shipment of 200 cases, 21,200 pounds cresol in cans from Philadelphia, Pa., to Mare Island, Calif., per bill of lading N–605606, April 18, 1929.

The carrier claimed $190.80 based on 21,200 pounds at 90 cents per 100 pounds and allowance was made for $189.56 based on 21,062 pounds, the delivered weight, from which was deducted $21.12 as the value of 16 gallons of cresol at $1.32 per gallon, lost through leakage.

The carrier in its application for review states that it must protest the deduction of $21.12 on account of leakage from the cases, as the shipment was outturned on the West Coast with no signs of bad handling and the bill of lading specifically relieves the steamer from liability for

ordinary leakage in which class it is contended this damage falls.

The Government bill of lading which the carrier filed in support of its claim for transportation charges contains a statement that:

> Shipment covered by this B/L checked at Mare Island several cases leaking. Check of contents showed a loss thru leakage of 16 gallons cresol. Value 16 gallons cresol at $1.32—$21.12, weight deducted 138#.

The carrier has acknowledged that the cases arrived in San Francisco in a leaking condition. The shipment was delivered to the steamship company in good condition and the damage to the cans causing the leakage appears to have occurred after delivery to the carrier at Philadelphia and before delivery at San Francisco.

The bill of lading exception "leakage, evaporation," etc., can not free the carrier from liability for a leak caused by negligence of the crew in handling and stowing the shipment. The cresol was in cans and the containers were not ordinarily from their inherent nature subject to leakage or evaporation. The leakage appears to have been such as would be occasioned ordinarily only by crushing or puncturing the cans and if such damage was due to rough handling and stowage the responsibility rests with the carrier. Under such circumstances, the leakage having occurred while the shipment was in the custody of the carrier, liability therefor may be avoided by the carrier, only upon proof that the leakage was not due to

the carrier's negligence. Such fact has not been established.

The settlement is sustained.

(Signed) LURTIN R. GINN,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 28

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, July 31, 1934.

Chief, Claims Division:

Returned herewith is the claim of the Texas and New Orleans Railroad Company for $32.68, representing $2.94 freight charges disallowed in settlement T–78982, November 25, 1931, and $29.74 deducted in said settlement as the value of certain property shipped from New York, N. Y., destined to New Orleans, Algiers, La., per bill of lading N–764369, May 5, 1931, and destroyed in transit. The bill of lading bore the following notation concerning loss or damage:

1 Bbl Chinaware, wt. approx. 151⅔ lbs., 3 cups, 81 dinner plates.
1 Bbl Chinaware, wt. 85 Lbs. all items.
The above material checked short

* * * * *

Invoice value * * * 29.74.

The disallowance and deduction noted above were made in accordance with this notation.

It appears that the shipment, consisting of certain articles in addition to the foregoing, was accepted by the Morgan line at New York and

moved therefrom May 6, 1931, on the S. S. *El Capitan*. Also, that the missing articles were destroyed by fire aboard ship; the average adjusters, Marsh & McLennan, New York, N. Y., having advised the Bureau of Supplies and Accounts, Navy Department, by letter of December 2, 1932, as follows:

> We have for acknowledgment your inquiry of November 25th, concerning 2 Barrels of China ware forwarded by the Navy Supply Depot, New York to the Naval Operating Base, New Orleans, La., which were destroyed by fire on the Steamship *El Capitan* Voyage No. 151.
>
> The records of the Southern Pacific Steamship Company, including the ship's manifest indicate that this cargo was actually on board at the time of the fire and survey report of General Average Cargo Surveyor, Mr. John A. McKee, Hibernia Bank Building, New Orleans, indicates that 2 barrels of China ware were destroyed in the fire. The outturn record of the Southern Pacific Steamship Company indicates that these 2 barrels were not discharged from the vessel at New Orleans after the fire had occurred.
>
> Inasmuch as the damage was not the result of the General Average act, we are unable to make good the loss in General Average. If any further information is required please call upon us.

The Navy Department reports that—

> There is no record of a claim having been received for general average contribution from the average adjusters, and in view of the statement in copy of letter enclosed, that the damage was not the result of a

> general average act, and inasmuch as the shipment was not insured, it is recommended that the amount withheld be refunded.

It thus appears that the property having been destroyed by fire and not as a voluntary sacrifice for the common benefit of the cargo, no right accrued to reimbursement of the value thereof in general average. Also, under the provisions of Section 4282, Revised Statutes, no owner of any vessel is liable to answer for or make good any loss or damage to any merchandise on such vessel by reason of any fire happening on board the vessel, unless such fire is caused by design or neglect of such owner. There is nothing to indicate any such design or neglect in the instant matter and accordingly the sum of $29.74 deducted as the value of the destroyed property may be allowed. See in this connection *In re Old Dominion S. S. Company*, 115 Fed. 845, and memorandum to you of July 2, 1931, in the case of the Dollar Steamship Lines, Inc., A-36841.

Concerning the freight charges on the destroyed property, claimed in the amount of $2.94, the general rule is that, in the absence of some stipulation to the contrary, the goods must be carried to destination before any freight is earned. See 58 C. J. 500, 503, "Shipping," sections 831, 838, and 840. The shipment here concerned moved under a Government bill of lading which contained in Condition 1, the provision—

> Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly ac-

complished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

This provision clearly contemplated that payment of freight charges were not to be made until the shipment was delivered at destination. It is accordingly inconsistent with and supersedes any requirement in the carrier's commercial or ocean bill of lading to the effect that freight shall be prepaid and that prepaid freight is to be considered as earned on the shipment of the goods and is to be retained by the ship owner "vessel or cargo lost or not lost." See *Toyo Kisen Kaisha* v. *W. R. Grace & Company,* 48 Fed. (2d) 850; affirmed 53 Fed. (2d) 740.

The claim for freight charges, amounting to $2.94, should be disallowed for the reason that freight was not earned on the property destroyed in transit.

(Signed) R. N. ELLIOTT,
Assistant Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 29

COMPTROLLER GENERAL OF THE
UNITED STATES,
Washington 25, Oct. 17, 1935.

MUNSON STEAMSHIP LINE,
Munson Building, 67 Wall Street,
New York, N. Y.

GENTLEMEN: Reference is made to your letter dated September 11, 1935, signed by A. Becraft,

in the matter of settlement T-92220½, dated June 19, 1934, which disallowed claim (Munson Steamship Line bill Munorleans V 69 S) for $98.60 in addition to $203.35 paid by Colonel Charles R. Sanderson, disbursing officer, United States Marine Corps, on voucher 7009, January 19, 1934 (Munson Steamship Line bill Munorleans 69 NB) for freight transportation from New Orleans, Louisiana, to Philadelphia, Pennsylvania, under bill of lading M-26601-34, dated July 28, 1933. On the back of this bill of lading in the space provided for "Report of Loss, Damage, or Shrinkage," the receiving officer reported—

> The * * * shipment was received with the following less * * *
>
> Box #42 was found pilfered and 29 flannel shirts, value $98.60, weight 32 pounds, missing. Box examined by agent of carrier and pilfering acknowledged.

The carrier originally claimed $303.13 for this transportation but the claim was returned by the Marine Corps for restatement on a basis which would reflect a deduction of $98.60 as the value of 29 shirts missing from the box numbered 42. The carrier having requested report of the receiving officer as to "nature of exceptions taken at time of delivery, particularly what exterior signs this box had of pilferage", and the officer's report being—

> * * * no exception was taken on the delivery of the goods, as it was a case of concealed loss.
>
> As soon as the loss was discovered, the case was set aside and your Mr. Wright

> notified. An Inspector from his office examined the case, and after minute inspection the case was found to have been broached on one side and recoopered.

The carrier thereafter restated the charge for the service in amount of $203.35 (bill Munorleans 69 NB) on the basis of freight charges in amount of $301.95 "Less claim account shortage—$98.60" and payment in amount of $203.35 was made by Colonel Sanderson on voucher 7009 (check No. 105664 dated January 19, 1934) and accepted by the carrier apparently without protest. Several months later, however, the carrier submitted claim (bill Munorleans V 69 S) for the $98.60 as deducted on bill Munorleans 69 NB urging—

> * * * Our claim department has investigated * * * claim and feels that it should be disallowed. * * * under the bill of lading, concealed loss does not constitute steamer's liability—our obligation being limited to delivery of containers intact as received—which apparently was accomplished in this instance.

This claim was disallowed in settlement T–92220½, for the reasons set forth therein. The carrier now urges—

> * * * Acceptance of cargo without complaint or exceptions constitutes good delivery. Except for this, carriers would be accountable for what might occur subsequently.
>
> * * * We feel * * * that we are entitled to payment * * * as it is not our custom to honor concealed loss and damage claims, since we give maximum protection on our steamers by stowage in

lockers under special custody of the mate, any risks of pilfering falling on the cargo which is ordinarily insured against.

Since this submission the receiving officer has reported further as follows:

(a) The missing shirts have not been located nor has there been an overage of a similar number of shirts reported at another station, within the knowledge of this office.

(b) The movement from the vessel at Philadelphia was made by Government conveyance and personnel.

(c) In so far as could be ascertained by this depot, there are no facts which might indicate that the missing shirts may have been abstracted at any time other than after delivery to the carrier at New Orleans and before delivery by the carrier at Philadelphia.

(d) The package in question was received at this warehouse, 8 September, 1933. However, it was not until the shipment was being removed from the containers preparatory to placing the contents in stock, on or about 15 September, 1933, that the shortage was definitely determined. At that time, box #42 was weighed before being opened, and the discrepancy in the weight caused a minute inspection, which revealed the fact that the box had been tampered with. The carrier was immediately notified of this fact and a representative visited this depot and inspected the pilfered box. Upon inspection by agent of the carrier, it was ascertained that the box had been expertly broached, a portion of the contents removed, and then recoopered.

(e) The fact that the box had been recoopered could not have been determined at the time of its receipt from the carrier due to the fact that the recoopering had been so well performed that only the closest scrutiny revealed this.

Thus the record shows as follows:

The carrier received this package apparently on July 28, 1933, and receipted for it as weighing 112 pounds and "in apparent good order and condition." Thereafter during a period of approximately six weeks, that is until September 8, 1933, the package was in the carrier's possession and when delivered to the consignee it was not obviously apparent from its appearance that there had been any tampering with its contents. Shortly thereafter, however, when about to open the package the consignee discovered a marked discrepancy between the then weight and the weight receipted for and charged for by the carrier, indicating abstraction of some part of the contents and he immediately notified the carrier whose inspector examined the package, ascertaining that it had been expertly broached, part of the contents removed and the package recoopered. The fact of the shortage was set forth on the bill of lading in the terms hereinbefore quoted apparently before surrender thereof to the carrier who accepted it in that form, deducted the value of the missing articles from the freight charges on the shipment, certified the account as so stated "correct and just" and accepted payment on that basis thus indicating assumption of liability for the shortage.

The missing articles have not been located and delivered, a similar overage has not appeared elsewhere and there is nothing to indicate that they might have been abstracted other than while in the carrier's possession. Concerning the carrier's assertion in the matter of concealed loss and damage there is for consideration that—

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies."

Liverpool and Great Western Steam Company v. *Phenix Insurance Company,* 129 U. S. 397 (437). See, also, The Jason, 225 U. S. 32, 56 L. Ed. 969; the Willdomino, 300 Fed. Rep. 5 (9/10) affirmed 272 U. S. 718, 71 L. Ed. 491.

In this situation there appears no basis to justify this office in certifying as properly chargeable against appropriated funds the amount now claimed by the carrier. On the contrary it appearing that the payment by Colonel Sanderson was on the basis in part of 97 cents per 100 pounds and a weight of 112 pounds for the package numbered 42 whereas the carrier delivered only 80 pounds there was an apparent overpayment of 31 cents which will be deducted in the settlement of an open account.

Respectfully,

(Signed) R. N. Elliott,
Acting Comptroller General of the United States.

ENCLOSURE NO. 30

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, May 9, 1940.

NORFOLK AND WASHINGTON, D. C. STEAMBOAT COMPANY,
Accounting Department,
Seventh Street Wharves,
Washington, D. C.

GENTLEMEN: There has been considered your request for review of the disallowance, made by settlement T-142138½, March 8, 1939, of your bill 9353-A for $587.96 in connection with the transportation in May and June, 1937, of household goods and professional books from Shanghai, China, and Bremerton, Washington, to Washington, D. C., under bills of lading M-41492-37 and M-29540-37.

The record shows that your bill 9353, claiming total charges in the amount of $724.90 for transportation and terminal charges under the above bills of lading, was paid in the amount claimed by Lieutenant Colonel Jeter R. Horton, Marine Corps disbursing officer, on voucher 9419, December 21, 1937. Thereafter you presented bill 9353-A for $587.96 additional and this claim was disallowed in full in settlement T-142138½ because:

> The claimant originally submitted its bill for freight charges for $1312.86, which the Marine Corps returned for restatement to $724.90 covering single haul charges. The claimant thereupon submitted its bill for $724.90 and certified it "Correct and just." In submitting the bill for $724.90 the claim-

ant made no statement that the smaller amount was being accepted under protest or that it reserved the right to claim an additional amount. So far as the present record shows, it appears that the claimant acquiesced in the payment of the smaller amount which will ordinarily effect discharge.

Therefore, there is nothing further due claimant.

The claim for $587.96 had been transmitted to this office by The Quartermaster, Headquarters, U. S. Marine Corps, May 24, 1938, with the following statement concerning the prior payment in the amount of $724.90:

> There is inclosed Norfolk & Washington D. C. Steamboat Company supplemental bill #9353–A in the amount of $587.96, claimed due from the Government in connection with two shipments of household goods, one from Shanghai, China to Washington, D. C., on bill of lading M–41492–37, and one from Marine Barracks, Puget Sound Navy Yard, Bremerton, Washington to Washington, D. C., on bill of lading M–29540–37. These two shipments were on the McCormick Line S. S. *West Mahwah*, which became stranded upon the rocks shortly after this steamer left San Francisco on its eastbound voyage #28 which voyage was abandoned and the cargo transferred to the McCormick Line S. S. *Everett*, which latter steamer transported the cargo to Norfolk, Va., at which port it was transferred to the Norfolk & Washington D. C. Steamboat Company for further transportation to Washington, D. C.
>
> On 14 December, 1937, this office returned Norfolk & Washington D. C. Steam-

boat Company bill #9353 in the amount of $1,312.86 for restatement to $724.90, which was for single haul charges from points of origin to destination.

The record fails to show that the bill 9353 for $724.90, as originally paid, contained any form of objection to accepting, as in full satisfaction of the charges properly due for the services in question, the amount therein claimed or any reservation of a right to claim an additional amount. On the contrary the bill was certified by the carrier, through its auditor, as being "correct and just." Moreover it is indicated that, although the original payment of $724.90 was made in December 1937, the supplemental bill was not presented until May 1938, there being attached to said supplemental bill a copy of a letter dated May 16, 1938, from the carrier's auditor to U. S. Marine Corps, Quartermaster, Washington, D. C., in which no mention of the prior payment as having been accepted under protest is made. See in this connection *Oregon-Washington R. R. & Nev. Co.* v. *United States*, 255 U. S. 339; *Western Pacific Railroad Co.* v. *United States*, 255 U. S. 349; *Louisville & Nashville Railroad Company* v. *United States*, 267 U. S. 395; *Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, 267 U. S. 403; *Southern Pacific Company* v. *United States*, 268 U. S. 263; *United States* v. *Reading Company*, 270 U. S. 320, 330. In view of the foregoing the record does not appear to support the conclusion that a claim for an additional amount for these services could now be maintained even if there had accrued originally a right to a larger amount.

The other matters urged, however, would seem insufficient to establish a right to the charges sought even as upon an original claim. It is not disputed that the charges paid, $724.90, are those that would have been properly due had the shipments been transported without necessity for the transfer of lading from the S. S. *West Mahwah* to the S. S. *Everett*. It is urged, however, that in addition to the charges so accruing and paid, the carrier is entitled to payment of additional charges in the amount of $587.96, being charges as for a new and separate shipment from San Francisco, California, the point at which the transfer of the lading occurred, to Norfolk, Virginia, the point at which the McCormick Steamship Company delivered the shipment to the Norfolk & Washington, D. C. Steamboat Company, plus certain charges incidental to the transfer at San Francisco, The occasion for the transfer of the lading from the S. S. *West Mahwah* to the S. S. *Everett* and the alleged transshipment is said to be that shortly after the S. S. *West Mahwah* left San Francisco "she ran aground and it was necessary to return her to San Francisco where she was declared a constructive total loss and her cargo discharged there." The S. S. *West Mahwah* was a vessel of the McCormick Steamship Company via whose line the bills of lading provided for transportation from the west coast port, to Norfolk, Virginia, the shipments having apparently been received by the S. S. *West Mahwah* at Seattle, Washington. The record shows that following notice that the S. S. *West Mahwah* had gone aground, Colonel Jeter R. Horton, A. Q. M., U. S.

M. C., addressed the Traffic Department, McCormick Steamship Company, by letter dated July 29, 1937, with respect to the shipment on bill of lading M–295–40–37, stating:

> * * * it is requested that the above-mentioned shipment be forwarded to its destination by your next available steamer which it is understood is the S. S. *Everett* scheduled to sail from San Francisco August 10th and due to arrive at Norfolk, Virginia, September 5th. Since this is a Government shipment, this letter is your authority for making the transfer as requested. All freight charges involved should be billed to the Quartermaster, U. S. Marine Corps, Washington, D. C. The posting of the general average security will be effected prior to the arrival of your steamer at Norfolk.

The same officer also addressed the carrier by letter of August 6, 1937, relative to the other shipment, as follows:

> The receipt is acknowledged of your letter of the 4th instant relative to forwarding of shipment of household goods covered by B/L M–41492–37, Shanghai, China, to Washington, D. C., which shipment was received by your S. S. *West Mahwah* at Seattle, Wash., a. l it is requested that this shipment be permitted to go forward via your first available sailing the S. S. *Everett* or a subsequent sailing.

The basis for the contention that under the above circumstances the carrier is entitled, in addition to the through charges already paid, to charges of $587.96 as for a new and separate shipment from San Francisco, is said to be the

following provision appearing in standard bill of lading of the McCormick Steamship Company:

> 3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or vessel lost or not lost; and the same shall be payable in United States currency, or its equivalent in local currency at Bank demand rate of exchange on New York at Carrier's option, and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the Shipper, Consignee and/or assignee shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable and so paid, on all damaged and unsound goods. * * *

It is insisted that the above provision is required to be applied by reason of the fact that the Government bills of lading on which the shipments

were accepted for transportation contained the provision:

> Unless otherwise specifically provided heron, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Thus the basis for the claim appears to be that under the above bill of lading provisions the right to payment of the full freight to the destination of the S. S. *West Mahwah* was earned when the vessel discharged the cargo at San Francisco and that for the transshipment in the S. S. *Everett* from San Francisco to Norfolk a right to charges as for a separate and independent shipment between those points accrued. As authority for the conclusion so urged reference has been made to the cases of *Allanwilde Transport Corporation* v. *Vacuum Oil Company,* 248 U. S. 377, and *James Richardson & Sons* v. *158200 Bushells of Wheat, et al.,* 90 Fed. (2d) 607.

In the *Allanwilde* case there was involved a shipment of nails under a bill of lading containing a provision apparently similar to that quoted above from the standard bill of lading of the McCormick Steamship Company. There was involved also a shipment of oil, made under a charter party which provided "freight to be prepaid not on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." The further facts, as indicated by the decision, were that the goods were loaded aboard the

Allanwilde at New York, New York, which set sail from that port September 11, 1917, the consignments being destined to Rochefort, France. The vessel having encountered a severe storm at sea, about five hundred miles from New York, returned to that port for repairs, which were duly effected. The vessel then attempted to resume the voyage but was denied clearance by reason of an embargo placed against sailing vessels bound for the war zone. Thereafter the goods, upon notice from the carriers, were unloaded by the shippers under protest. It was held that the carrier was justified in refusing to refund the prepaid freight. In this connection the court stated:

> The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "freight to be prepaid net on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—"Freight to be prepaid net on signing bills of lading * * * Freight earned, retained and irrevocable, vessel lost

> or not lost." The provision was not idle or accidental. * * *

Thus the decision appears to have been rested upon the fact that the inclusion of the provision was the deliberate act of the parties made with the intention that it, together with other provisions not inconsistent therewith, should be the measure of the rights and obligation of the carrier and shipper.

In the instant case the shipments were transported pursuant to the terms of Government bills of lading which stipulated that the property therein described was received by the initial carriers concerned "to be forwarded subject to conditions stated on the reverse hereof" from the points of origin named therein to Washington, D. C. "by said company and connecting lines." Bill of lading M–29540–37, covering the shipment from Bremerton, Washington, showed the Puget Sound Navigation Company as the initial carrier and specified transportation "via Seattle, Wash., McCormick SS Co., Norfolk, Va., Norfolk & Wash. SS Co." Bill of lading M–41492–37, covering the shipment from Shanghai, China, Showed the Dollar Steamship Company as initial carrier and specified transportation "via Dollar Steamship Co., McCormick Steamship Co. to Norfolk, Va., Norfolk & Washington Steamship Co. To Washington, D. C." Under the heading of "Conditions" on the reverse of the bill of lading it was provided in each instance:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is further stated on the reverse of the bills of lading in paragraph 2, under the heading of "Instructions," that—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bills of lading, therefore, required delivery of the shipments before the right to payment of freight charges should accrue, and this provision of the contract of car-

riage was not altered by the fact that the carrier's commercial bills of lading may have contained a provision for payment for full freight to destination "Goods or Vessel lost or not lost." In this connection it is to be noted that condition 2 of the Government bill of lading, under which it is claimed the shipments here concerned were made subject to the same rules and conditions as govern commercial shipments, contained the qualifying provision, "Unless otherwise specifically provided hereon." As indicated above the Government bill of lading itself provides for receipt of the goods by the consignee before payment, and any provision otherwise in commercial bills of lading of the carrier concerned would be inoperative as to the shipments here concerned.

A somewhat similar set of circumstances was involved in the case of *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 3 Fed. (2d) 740. That case involved a shipment of nitrate of soda from Chilean ports destined to Honolulu, T. H. Arrangements for the transportation had been made in January 1921 and were confirmed in letter dated January 14, 1921, from the carrier to the shipper in which appeared the following:

> 2500 Long tons Nitrate of Soda March Shipment per *Tokuyo Maru* from Nitrate Port to Honolulu at $7.00 per ton of 2240 lbs., gross weight delivered.
>
> Freight payable in San Francisco on receipt of weights from Honolulu.
>
> This cargo to be loaded according to custom of port in Chile and to be discharged at rate of 400 tons per day, 2000 tons to be discharged at railroad wharf, Honolulu, and 500 tons at Inter-Island

> Steam Navigation Co's wharf which is adjacent * * *.
>
> * * * * *
>
> All on board to be delivered.

Bills of lading, signed by the master of the ship and by shipper's agent, were issued by the vessel providing that the freight for the cargo was "to be paid, as per margin in DESTINATION." One bill of lading specified in the margin "freight as per agreement" and the other "freight as agreed." Each bill of lading contained the printed provision that freight was "to be considered as earned, lost or not lost." The steamship, proceeding on her voyage was lost, with her cargo, by fire at sea. It was held that under the terms of the original arrangement or agreement payment of freight could not be obtained without delivery at Honolulu. In this connection the court said:

> On the threshold of our inquiry, we find that the provision for paying the freight after the goods were delivered, contained in the original agreement, accords with the dictates of good conscience, with the doctrines of general law, and, according to one of appellant's own witnesses, "the usual and customary method of shipping nitrate cargo."

and:

> If the appellee's contention is correct, and the letter should be looked to alone for time of payment, appellant can never collect the freight. If the appellant's view is sustained, it can collect its freight after a reasonable time "after the vessel should have arrived (but did not) at Honolulu."

As indicated above the decision, in effect, accepted appellee's, and rejected appellant's, views as thus expressed.

In the instant matter the original agreement, as expressed in the Government bills of lading, required, no less than did the original agreement in the case just noted, delivery before payment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

The case of *James Richardson & Sons* v. *158200 Bushels of Wheat*, 90 Fed. (2d) 607, cited in the request for review, involved facts and bill of lading conditions materially different from those involved in the present claim, and does not appear to constitute authority for the conclusion urged here.

Accordingly, the disallowance of the additional charges claimed as for a new and separate shipment from San Francisco, California, to Norfolk, Virginia, was proper and is sustained.

Respectfully,

(S) R. N. Elliott,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 31

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, May 20, 1940.

RICHMOND, FREDERICKSBURG & POTOMAC
RAILROAD COMPANY,
Accounting Department,
Richmond, Virginia.

GENTLEMEN: There has been considered your request for review of settlement No. T–117006, February 15, 1938, under which you were allowed $624 of the sum of $936.15 claimed in your bill No. F–3184, for the transportation of 1,140 cubic feet of household goods, weighing 11,455 pounds, from Tientsin, China, to Quantico, Virginia, under Government bill of lading No. M–41657–37, dated May 11, 1937.

It appears that the said property was tendered to the Dollar Steamship Company who transported the shipment from Tientsin to San Francisco on the steamship *President Coolidge* and at San Francisco the shipment was transferred to the *West Mahwah* for movement via the Panama Canal to the port of Baltimore, Maryland, by the McCormick Steamship Company. After leaving San Francisco, California, the *West Mahwah* suffered damages such as to require it to be returned to San Francisco with its cargo, where the property here concerned was transferred to the steamship *Everett* of the McCormick Steamship Company, in which vessel the shipment subsequently arrived at Baltimore, Maryland, where it was transshipped by rail to Quantico, Virginia.

Insofar as is here pertinent, it appears that the shipment was accepted at Tientsin by the Dollar Steamship Line for movement to Baltimore, Maryland (en route to Baltimore, Maryland), for which a through rate of $20 per ton of 40 cubic feet was applicable, being the rate upon which was based the amount ($570) you have received in payment for the transportation from Tientsin to Baltimore. It is not disputed that such charges are those that would have been properly due had the shipment been transported without necessity for transfer of lading from the steamship *West Mahwah* to the steamship *Everett*. It is urged, however, that in addition to the charges so accruing and paid, the carrier is entitled to payment of additional charges in the amount of $312.15, being charges as for a new and separate shipment from San Francisco, California, the point at which the transfer of the lading occurred, to Baltimore, Maryland, the point at which the McCormick Steamship Company delivered the shipment to the rail carrier plus certain charges incident to the transfer at San Francisco. In this connection you refer to a letter addressed to you by the General Agent of the McCormick Steamship Company, Baltimore, Maryland, dated April 12, 1938, file C–4–3, wherein it is stated in pertinent part that—

> After the voyage of the SS WEST MAHWAH was abandoned, we find that we secured release in connection with this shipment granting authority to reforward on the SS EVERETT or subsequent vessel. It was thoroughly understood that we were exercising our right under the bill of lading

> to earn additional freight, and it was considered that collect freight on the SS WEST MAHWAH was earned prior to the time the freight was loaded on the following vessel. * * * we can not treat Government shipments different from any others and in each and every instance, a second freight was collected when the freight was forwarded Eastbound.

The basis for the contention that under the circumstances here present the carrier is entitled, in addition to the through charges already paid, to charges of $312.15, as for a new and separate shipment from San Francisco, apparently rests upon the following provision appearing in standard bill of lading of the McCormick Steamship Company:

> 3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be Borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost; and the same shall be payable in United States currency, or its equivalent in local currency at Bank demand rate of exchange

> on New York at Carrier's option, and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof: and the Shipper, Consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable and so paid, on all damaged and unsound Goods. * * *

Apparently, it is considered that the above provision is required to be applied by reason of the fact that the Government bills of lading on which the shipments were accepted for transportation contained the provision:

> Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Thus the basis for the claim appears to be that under the above bill of lading provisions the right to payment of the full freight to the destination of the steamship *West Mahwah* was earned when the vessel discharged the cargo at San Francisco and that for the transshipment in the steamship *Everett* from San Francisco to Baltimore a right to charges as for a separate and independent shipment between those points accrued.

In the instant case the shipment was transported pursuant to the terms of a Government bill of lading which stipulated that the property therein described was received by the initial carriers concerned "to be forwarded subject to the conditions stated on the reverse hereof" from the

point of origin named therein to Quantico, Virginia, "by said company and connecting lines." The bill of lading showed the "Dollar Steamship" as the originating carrier and specified transportation via "San Francisco-McCormick Steamship Co. Baltimore, B&O. RR, Richmond, Fredericksburg & Potomac RR." Under the heading of conditions on the reverse side of the bill of lading its was provided:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.
>
> "2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is further stated on the reverse of the bills of lading in paragraph 2, under the heading of "Instructions," that—

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bill of lading, therefore, required delivery of the shipment before the right to payment of freight charges should accrue, and this provision of the contract of carriage was not altered by the fact that the carrier's commercial bills of lading may have contained a provision for payment for full freight to destination "Goods or Vessel lost or not lost." In this connection it is to be noted that condition 2 of the Government bill of lading, under which, apparently, it is claimed the shipments here concerned were made subject to the same rules and conditions as govern commercial shipments, contained the qualifying provision, "Unless otherwise specifically provided hereon." As indicated above the Government bill of lading itself provides for receipt of the goods by the consignee before payment, and any provision otherwise in commercial bills of lading of the carrier concerned would be inoperative as to the shipments here concerned.

A somewhat similar set of circumstances was involved in the case of *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. (2d) 740. That case involved a shipment of nitrate of soda from Chilean ports destined to Honolulu, Territory of Hawaii.

Arrangements for the transportation had been made in January 1921 and were confirmed in letter dated January 14, 1921, from the carrier to the shipper in which appeared the following:

> 2500 Long tons Nitrate of Soda March shipment per *Tokuyo Maru* from Nitrate Port to Honolulu at $7.00 per ton of 2240 lbs., gross weight delivered.
>
> Freight payable in San Francisco on receipt of weights from Honolulu.
>
> This cargo to be loaded according to custom of port in Chile and to be discharged at rate of 400 tons per day, 2000 tons to be discharged at railroad wharf, Honolulu, and 500 tons at Inter-Island Steam Navigation Co's wharf which is adjacent * * *.
>
> * * * * *
>
> All on board to be delivered.

Bills of lading, signed by the master of the ship and by shipper's agent, were issued by the vessel providing that the freight for the cargo was "to be paid, as per margin in DESTINATION." One bill of lading specified in the margin "freight as per agreement" and the other "freight as agreed." Each bill of lading contained the printed provision that freight was "to be considered as earned, lost or not lost." The steamship, proceeding on her voyage was lost, with her cargo, by fire at sea. It was held that under the terms of the original arrangement or agreement payment of freight could not be ob-

tained without delivery at Honolulu. In this connection the court said:

> On the threshold of our inquiry, we find that the provision for paying the freight after the goods were delivered, contained in the prior agreement, accords with the dictates of good conscience, with the doctrines of general law, and, according to one of appellant's own witnesses, "the usual and customary method of shipping nitrate cargo."

and:

> If the appellee's contention is correct, and the letter should be looked to alone for time of payment, appelant can never collect the freight. If the appellant's view is sustained, it can collect its freight after a reasonable time "after the vessel should have arrived [but did not] at Honolulu."

As indicated above the decision, in effect, accepted appellee's, and rejected appellant's, views as thus expressed.

In the instant matter the original agreement, as expressed in the Government bill of lading, required, no less than did the original agreement in the case just noted, delivery before payment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss

of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

Accordingly, the disallowance of the additional charges claimed as for a new and separate shipment from San Francisco, California, to Baltimore, Maryland, was proper and is sustained.

Respectfully,

(Signed) R. N. ELLIOTT,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 32

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, June 2, 1941.

ALCOA STEAMSHIP COMPANY, INCORPORATED,
17 Battery Place, New York, N. Y.

GENTLEMEN: Reference is made to your letter of April 10, 1941, concerning the question of freight charges on a Government shipment moving under a Government bill of lading, in the event of an accident en route which occasions the loss or destruction of the shipment, thereby rendering it impossible for you to furnish a receipt for the property in support of your claim for charges. In this connection, you state that the Government bill of lading by its terms is subject to the same rules and conditions which govern commercial shipments made on usual forms and

that your "usual form of Bill of Lading on Southbound cargo specifies that the freight has been prepaid and therefore is not at the risk of the steamship company." You request to be informed also whether the United States places insurance to cover freight, marine and war risks on Government cargo which moves in commercial vessels.

The jurisdiction of this office is such that a decision may not be rendered you upon the abstract questions so presented. However, with respect to the question of freight charges under conditions such as described, attention is invited to the fact that the Government bill of lading provides in condition 1 that prepayment of charges shall in no case be demanded and that payment will be made on presentation of the bill of lading properly accomplished, while the reverse side of the bill of lading contains instructions under which the consignee upon receipt of the shipment is to sign the consignee's certificate on the original bill of lading and surrender it to the carrier, which then becomes the evidence upon which settlement for the service is to be made.

Relative to your query pertaining to the matter of insuring Government property in transit, you are referred to the Government Losses in Shipment Act of July 8, 1937, 50 Stat. 479, as amended by the Act of August 10, 1939, 53 Stat. 1358.

Respectfully,

(Signed) R. N. ELLIOTT,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 33

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, Aug. 2, 1943.

ALCOA STEAMSHIP COMPANY, INCORPORATED,
Cargo Claim Department, 111 Broadway,
New York, N. Y.

GENTLEMEN: Reference is made to your letter of February 17, 1943, in which you take exception to the disallowance of your bill No. Cl–91 for $287.42 under certificate No. 199154½, February 6, 1943. The said amount represents deductions by Stephen J. Brune, Navy disbursing officer, under vouchers 3690, 3691 and 3692, June 5, 1942 from amounts otherwise due on bill No. NY 2731, and apparently two others, for the value of, and the unearned freight on, 13 crates of carrots, 10 crates of turnips, 15 crates of parsnips, 100 pounds of onions, and 300 pounds of potatoes, being part of a shipment of miscellaneous commodities laden aboard the S. S. *Alcoa Pilgrim* from New York, New York, to Georgetown, British Guiana, under bill of lading No. N–803919, January 15, 1942. The record indicates that the above-mentioned vegetables "perished" in transit. However, it is your contention that under the terms of your commercial form of bill of lading fresh vegetables "are received and carried at the sole risk of the owner" and, therefore, the carrier not being liable for the subject loss, the amount deducted by the disbursing officer should be paid.

With respect to the limitation of the carrier's liability as set out in the commercial form of bill of lading, it is to be observed that such limitation is valid only insofar as it might be authorized by the Carriage of Goods by Sea Act. See 46 U. S. C. A., sections 1300 and 1303 (8). Even where a bill of lading undertook to exempt the carrier from liability for damage resulting from a specific cause, as sweat, the showing of the existence of that condition alone was insufficient to relieve the carrier if it failed to provide, without excuse, adequate ventilation, or if its improper stowage contributed to the destruction of the cargo, or if it was otherwise negligent in handling the cargo. *Wessels, et al.* v. *S. S. Asturias, et al.*, 126 F. 2d 999.

The record does not show the ventilation accorded the shipment nor is there anything to indicate how the shipment was stowed excepting the unsupported statement of the carrier to the Navy Department July 24, 1942, that no arrangement for special stowage having been made, "The shipment in question was stowed in the 'tween deck which is, as you know, well ventilated." Accordingly, on the basis of the present record, the subject settlement is sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 34

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, June 21, 1943.

COASTWISE (PACIFIC FAR EAST) LINE,
222 Sansome Street, San Francisco, Calif.

GENTLEMEN: Reference is made to your letter of October 5, 1942, file C(PFE)LINE 33713-2, pertaining to the disallowance of your claim totalling $4,106.56 for 3 shipments of Government property laden aboard the S. S. *Coast Merchant* in December 1941, which were covered by bills of lading Nos. JDH-M-32841-42, JDE-M-32941-42, and JDH-M-32896-42, reading from San Francisco, California, to Manila, Phillippine Islands. The said claims were disallowed by certificate No. 195996½, September 24, 1942, because the record at that time indicated tender of the shipments to the American President Lines, Limited, and, therefore, the interest of the Coastwise (Pacific Far East) Line was not apparent. You have now furnished waivers executed in your favor by the American President Lines, Limited, relinquishing that carrier's rights, title, and interest in the subject bills of lading, and the memorandum copies of the Government bills of lading indicated that they were signed in the name of the American President Lines "For the Master, and for Coastwise (Pacific Far East) Line, chartered owners of the vessel." In effect you seek payment in the aggregate amounts of $3,796.36 for transportation, plus $63.64 for

handling, $38.98 for tolls, and $207.58 for demurrage at San Francisco.

It is alleged that the shipments in question were aboard the S. S. *Coast Merchant* on voyage No. 79–W. With reference to that voyage in connection with other Government shipments, it is reported in your letter of February 11, 1942, addressed to the Bureau of Supplies and Accounts, Transportation Division, United States Navy Department, that:

> S. S. *Coast Merchant*—This vessel started loading cargo at San Francisco December 5, 1941, for discharge at Guam and Manila. Loading was completed December 18th and after having cleared she proceeded to Naval anchorage to wait convoy, pursuant to orders of the United States Navy. As in the case of the *Coast Miller*, constant contact with the Twelfth Naval District was maintained while at anchorage waiting convoy, and finally we were ordered by the Maritime Commission to discharge the vessel's cargo at San Francisco. The vessel proceeded from the Naval anchorage to her pier and started the discharge of cargo January 2, 1942. Discharge of cargo was completed January 8, 1942, at which time the voyage was abandoned.
>
> In addition to the statement of freight and attached vouchers, we attach hereto a photostatic copy of the order of the United States Maritime Commission to discharge the above vessels at San Francisco. As you will observe, this order was signed by E. J. Bradley, Pacific Coast Representative, Division of Emergency Ship-

ping, and for your convenience we quote the order as follows:

"UNITED STATES
MARITIME COMMISSION,
"*San Francisco, Calif., December 31, 1941.*

"COASTWISE (PACIFIC FAR EAST) LINE,
"*222 Sansome Street, San Francisco, Calif.*

Re: S. S. *Coast Miller*—S. S. *Coast Merchant.*

"GENTLEMEN: Pursuant to authority granted by the laws of the United States and proclamations of the President of the United States, you are hereby directed to immediately effect discharge of the above two vessels which are both now understood to be lying at the Port of San Francisco, California, notifying us when the same has been completed and immediately the said vessels are free of cargo at said port, make them and both of them available to the United States Maritime Commission, or its nominee, for use by it, or its nominee, on a time charter basis, the terms to be hereafter arranged.

"Kindly confirm.

"Yours very truly,

"B. J. BRADLEY,
"*Pacific Coast Representative,*
"*Division of Emergency Shipping.*"

It appears that the above-mentioned charges for transportation are based upon rates from San Francisco to Manila, apparently upon the view that full freight to Manila is payable by reason of "Clause 9" of your commercial bill of lading, quoted in your letter, *supra,* in part to read—

> If because of war hostilities * * * or any other action or regulation of any

government or people * * * Carrier or Master shall deem it impossible, imprudent or * * * inadvisable to proceed to such port or to load or discharge the goods there * * *

(1) Vessel may omit to call or to load the goods at port of shipment, or having loaded may discharge them there, and carrier may: (a) store them at said port or (b) arrange for forwarding them to or toward the port of destination. * * *

The storage provided for in this clause may be in lighters or craft or on wharf or shore. * * * *Any such storage* or forwarding shall be arranged by carrier in the capacity of shipper's agents and at shipper's cost and risk, and *shall constitute final delivery under this contract.*

The carrier and the vessel shall have liberty to comply with any directions or recommendations * * * given by any government or local authority * * * Nothing done in compliance with any such direction or recommendation shall be deemed a deviation and *delivery or other disposition of the goods in accordance therewith shall be a fulfillment of the contract voyage.*

The letter of February 11, 1942, suggests that the delivery of the goods at San Francisco, pursuant to directions of the Government, constituted "fulfillment of the contract voyage."

The Government bill of lading, Standard Form No. 1058, embodies the following conditions, among others, to which the forwarding of the shipment covered thereby is made subject:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

Also, under the caption of "Instructions," on the back of the bill of lading under paragraph 2, appears the following:

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

It is to be observed that condition No. 2 of the Government bill of lading providing that the rules and conditions of the usual forms provided by the carrier for commercial shipments is subject to the provision "Unless otherwise specifically provided or otherwise stated hereon." In this connection there is for consideration the fact that condition No. 1 of the Government bill of lading provides for payment upon presentation by the carrier of

the Government bill of lading "properly accomplished," which, in accordance with paragraph 2 of the instructions on the Government bill of lading, contemplates that "The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier."

Thus, under the express provision of condition No. 1 of the Government bill of lading, payment for the service covered by the bill of lading is to be made upon the presentation of said bill of lading "properly accomplished" which contemplates execution of the consignee's certificate of delivery thereon showing that the particular shipment was received at the destination by the consignee. In the present case it appears that the Government bills of lading indicated the "Post Quartermaster, Marine Barracks, Cavite, P. I." as the consignee and Manila, Philippine Islands, as the destination of the shipments. These shipments were not transported to the indicated destination and the bills of landing could not have been accomplished to show that fact.

However, provision has been made, in the event of loss or destruction of the original bill of lading, for the issuance by the consignor of a "Certificate in Lieu of Lost Bill of Lading," Standard Form No. 1061, which, after having been filled in by the consignor, may be furnished the carrier by the consignee, this procedure being authorized in General Regulations No. 69, August 24, 1928, 8 Comp. Gen. 695. The said certificate embraces a form of certificate for execution by the consignee showing in effect that the property was received

in good order, and that the original bill of lading has not been received nor can it be located.

The charges claimed in the present instance are supported in each instance by a "Certificate in Lieu of Lost Bill of Lading," each of which bears reference to the Government bill of lading covering the particular shipment here involved, and carries the following statement—

> MATERIAL AS LISTED HEREON WAS DISCHARGED AT SAN FRANCISCO DUE ABANDONED VOYAGE BY ORDERS OF NAVY DEPARTMENT. IT IS HEREBY CERTIFIED THAT THIS MATERIAL WAS RECEIVED FROM THE COASTWISE (PACIFIC FAR EAST) LINE IN GOOD ORDER & CONDITION AT SAN FRANCISCO BY DEPOT QUARTERMASTER DEPOT OF SUPPLIES, USMC.

The "Certificate of Consignee" on the said certificates indicates the "DEPOT OF SUPPLIES, USMC" as the consignee of the shipments and is signed by W. V. Harris, Captain, U. S. M. C. Obviously, however, the Depot of Supplies, U. S. M. C. was not the consignee, nor was San Francisco, the destination of the shipments. It is apparent therefore that these certificates in lieu of lost bill of lading, which have not been signed by the consignor, do not establish the fact of receipt of the shipments as contemplated in the respective Government bills of lading. At best they appear to be mere receipts showing that the property was received at San Francisco by the Depot of Supplies, U. S. M. C. from the Coast-

wise (Pacific Far East) Line. It is equally apparent that the service called for on the Government bills of lading was not performed. As to the effect—upon the carrier's right to payment of transportation charges—of a provision in the commercial form of bill of lading inconsistent with the requirements of the contract of carriage otherwise established see *Toyo Eisen Kaisha* v. *W. R. Grace & Co.*, 53 F. (2d) 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.
> * * *

This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure* v. *United States*, 19 C. Cls. 173. Accordingly, with reference to the transportation charges here involved the settlement must be, and is, sustained.

With respect to the amounts of $63.64 for handling, $38.98 for tolls, and $207.58 for demurrage, at San Francisco, it appears that these charges are for services actually performed, and, there-

fore, the total amount of $310.20 will be certified for allowance. Payment should reach you in due course.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

ENCLOSURE NO. 35

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, Sep. 17, 1943.

BULL-INSULAR LINE, INCORPORATED,
Pier 5, Pratt Street, Baltimore 2, Md.

GENTLEMEN: Reference is made to your letter of January 5, 1942 (1943), file S. S. *Barbara*, V–196, San Juan B/L 25, relative to the payment of $3.72 freight charges for a shipment of one boxed typewriter from Baltimore, Maryland, to San Juan, Puerto Rico, under Government bill of lading No. WAPR–15776, February 24, 1942, laden aboard the S. S. *Barbara*. Your bill for the amount stated and bearing the above file reference was disallowed by certificate No. 1959181/2, September 18, 1942, for reason that the shipment never arrived at destination owing to destruction of the vessel alleged to have been by enemy action. It is your contention that the freight is properly payable and, in support thereof, you quote certain provisions of paragraphs 11, 28, and 29 of your commercial bill of lading, a copy of which was received with your letter.

The provisions so quoted, appear, however, to relate to release of the carrier from liability for the value of property lost, etc., upon the happening of certain contingencies, among which is loss of the shipment by an act of enemies. In the present instance no claim appears to have been presented by the United States for the value of the typewriter, therefore, the quoted provisions of the commercial bill of lading are not pertinent.

The amount disallowed represented freight charges on the shipment in question and it is observed in this connection that paragraph 5 of your commercial bill of lading states—

> Full freight to destination, whether intended to be prepaid or collect at destination, and all advance charges against the Goods are due and payable to Bull-Insular Line, Inc., upon receipt of the Goods by the latter * * * [and] shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost, or if the voyage be broken up * * *.

The two covenants, however, the one to pay freight and the other to compensate for the loss of cargo, are independent. The right to freight money may depend upon and be controlled by different conditions from those effecting the loss of cargo. *Transmarine Corporation* v. *R. W. Kinney Co. Inc.*, 11 Pac. 2d 877; *The Pehr Upland*, 271 Fed. 340, 345.

In the present instance the contract of affreightment was represented by the Government

bill of lading, Standard Form No. 1058, which embodies, among the provisions to which the forwarding of the shipment covered thereby is made subject, the following:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.
>
> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."
>
> Also, under the caption of "Instructions," on the back of the bill of lading appears the following:
>
> "2. * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct."

Accordingly, in the absence of express provision to the contrary, under the terms of the Government bill of lading, delivery of the ship-

ment at the port of destination was a condition precedent to the right to freight. The contract of affreightment, in effect, embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions were not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that the provision in the commercial bill of lading requiring the prepayment of freight in cash upon delivery of the bills of lading is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that full freight to destination is due and payable upon receipt of the goods by the Bull-Insular Line, Inc., and "shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost," is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading "properly accomplished." See in this connection *Toyo Kisen Kaisha* v. *W. R. Grace & Co.* 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of

> any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances* 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure* v. *United States*, 19 C. Cls. 173.

Accordingly, the disallowance of the subject claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, Dec. 15, 1942.

BULL-INSULAR LINE, INCORPORATED,
Pier 5, Pratt Street, Baltimore, Md.

GENTLEMEN: You have requested the review of certificate No. 1959181/2, September 18, 1942, which disallowed your bill S. S. *Barbara* Voy. 196, S. J. B/L 25, for $3.72, representing the transportation charges on 1 boxed Underwood typewriter, from Baltimore, Maryland, to San Juan, Puerto Rico, tendered to you under bill of lading WAPR 15776, February 24, 1942, the disallowance being due to lack of evidence to sup-

port the claim. You now furnish a statement signed by your assistant cashier to the effect that the vessel aboard which the shipment was loaded was destroyed by enemy action.

The Government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise.

Accordingly, upon this record, the charges claimed were properly disallowed.

Respectfully,

(Signed) R. N. ELLIOTT,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 36

COMPTROLLER GENERAL OF THE
UNITED STATES,
Washington 25, Nov. 25, 1944.

LUCKENBACH STEAMSHIP COMPANY, INCORPORATED,
120 Wall Street, New York 6, N. Y.

GENTLEMEN: There has been considered your request for a review of the settlement per certificate No. 210967, dated October 18, 1943, which disallowed $27,069.21 of your claim, per bill 62–A, for $29,437.75 additional to $4,580.76 previously paid you for transportation of steel tanks, which were carried on the steamship *Andrea Luckenbach*, Trip 690–A, sailing from New York, New York, December 1, 1941.

The record shows that the shipment here concerned consisted of 11 plate steel tanks, each weighing 25,000 pounds and measuring 4,618 cubic feet, which were shipped aboard the vessel named under bill of lading WQ 3112075, consigned to Manila, Philippine Islands. Apparently, due to the outbreak of hostilities in the Far East, two of the tanks were delivered to the Port Transportation Officer, Balboa, Canal Zone, and the remainder of the ship's cargo, including the remaining nine tanks was discharged at Stockton, California. For this service you presented your bill 62 in the amount of $34,018.51, computed on the basis of full tariff rate from New York to Manila, plus certain accessorial charges, and payment was made by J. P. Tillman, Army disbursing officer, on voucher 47405, June 11, 1942, in the amount of $4,580.76, with the explanation:

> Corrected to rates New York to Stockton, Calif. as delivery is shown at Stockton, U. S. Intercoastal Conference Tariff 1–C.

Subsequently, your claim for the difference of $29,437.75, based on the contention that under the carrier's commercial bill of lading all freight charges are earned to original contracted destination when voyage is broken or frustrated, was disallowed by this office in certificate of settlement noted above, and freight charges based on the actual service rendered were computed as follows:

Two tanks delivered at Balboa, Canal Zone (Atlantic and Gulf-Panama Canal Conference Tariff: PB–1):	
9,236 cubic feet, @ $.31	$2,863.16
Heavy Lift Charges 50,000 pounds, @ $.75 per cwt	375.00
Isthmus Transfer 9,236 cubic feet, @ $1.50 per 40 cubic feet	346.35

Nine tanks delivered at Stockton, California (United States-Intercoastal Conference Tariff 1-C):	
225,000 pounds, @ $1.18 per cwt	2,655.00
Heavy Lift Charges, @ $0.20 per cwt	450.00
Wharfage 41,562 cubic feet, @ $0.25 per 40 cu. ft	259.76
Total charges	6,949.27

Accordingly you were allowed the sum of $2,368.51.

The subject Government bill of lading stipulated the conditions of shipment and provided in pertinent part that:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.
>
> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

The contract of affreightment here concerned was represented by the Government bill of lading, which in effect embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore,

that the stipulation in the commercial bill of lading indicated as being that "Prepaid freight is to be considered earned on receipt of the goods by the carrier and is not returnable whether goods or ship be at any time thereafter lost or not lost," is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished. It should be observed in this connection that paragraph No. 2 of the instructions on the Government bill of lading states—

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition No. 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bill of lading, therefore, required delivery of the shipment before the right to payment of freight charges should accrue, and this provision of the contract of carriage was not altered by the fact that the carrier's commercial bill of lading may have contained a provision that freight charges are to be considered as earned on receipt of goods by the carrier. See in this connection the

case of *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances*, 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure* v. *United States*, 19 C. Cls. 179.

The charges as computed in settlement No. 210967 were based upon the tariff rates and accessorial charges incidental to movement of freight under the cited tariffs. In other words had the shipment here concerned been destined to Balboa, Canal Zone, and Stockton, California, originally on the date of shipment from New York, the total charge for transportation would have been $6,949.27, as computed in the settlement. Accordingly, the settlement is sustained. Concerning your inquiry in letter of November 14, 1944, as to certain other shipments via this

vessel, you are advised the settlements in question are receiving attention and you will be further informed as to the disposition of the questions involved as promptly as circumstances will permit.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 37

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, March 27, 1945.

UNITED FRUIT COMPANY,
Freight Traffic Department,
Pier 2, North River, New York 4, N. Y.

GENTLEMEN: Reference is made to your letter of January 30, 1945, file 1–122, 700, 703, FA–3, relative to your claim for $6.10 which was disallowed by certificate No. 1959121/2, October 5, 1942.

The said amount represents ocean freight charges alleged to have accrued on a shipment of unexposed photographic film from Puerto Limon, Costa Rica, to New York, New York, under bill of lading No. WAPR 11543, April 1, 1942. Presumably the property was lost with the S. S. *Esparta* on voyage No. 5, March 1942, when, as stated on the bill of lading, the *"SHIP /was/ SUNK BY ENEMY ACTION."* Therefore, the shipment not having reached the destination called for in the contract of affreightment, the claim was disallowed.

It is your contention that in accordance with the principles set forth in decisions of May 27, 1918, 24 Comp. Dec. 707, and of April 7, 1942 (S–24613), 21 Comp. Gen. 909, the subject claim should be paid on the ground that the disaster constituted an excusable failure to make delivery. Also, you direct attention to the letter of May 11, 1944 (A–24222), addressed to the War Shipping Administrator, with reference to the WARSHIP LADING form of bill of lading.

The shipment here in question was transported under the terms of a Government bill of lading and the conditions of the contract of carriage as stipulated in the said bill of lading are, in pertinent part, that:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.
>
> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made by the usual forms provided therefor by the carrier."

The form of commercial bill of lading transmitted with your letter of June 20, 1942, file 6K–122, addressed to the Claims Division of the Gen-

eral Accounting Office, and which is indicated as having been in use by the United Fruit Company at the time of this shipment, provides in clause 5 thereof that:

> Full freight through to destination of the Goods, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to the United Fruit Company upon receipt of the Goods by the latter; and the same * * * shall be deemed fully earned and due and payable irrevocably to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost, or if the voyage be broken up, or in any circumstances whatsoever * * *.

The contract of affreightment as represented by the Government bill of lading in effect, embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent therefore that the provision in the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that "Full freight through to destination * * * due and payable * * * upon receipt of the Goods" by the carrier;" and the same * * * shall be deemed fully earned and due and payable irrevocably to the Carrier at any stage, before or after loading * * * Goods or Vessels lost or

not * * * or in any circumstances whatsoever" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplated that:

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made.

There is to be noted, also, the statutory limitation, upon payments to be made under contracts for service, imposed by section 3648 of the Revised Statutes of the United States, which provides in pertinent part that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within "the value of the service" *McClure* v. *United States*, 19 C. Cls. 173. The provision of the commercial bill of lading to the effect that freight is deemed

earned upon receipt of the property by the carrier seems clearly repugnant to the above statutory provision, which requires that, in the case of a contract for service, payment shall not exceed the value of the service rendered.

With reference to the decision of May 27, 1918, 24 Comp. Dec. 707, it is to be observed that the shipments there involved were said to have been made "subject to all clauses and conditions of bills of lading in use by steamship lines" while the subject shipment was made subject to the terms of the carrier's commercial form of bill of lading only to the extent that such terms were not in conflict with the terms of the Government bill of lading. But even in that case the decision points out very clearly that "Section 3648, Revised Statutes, prohibits payment in excess of the service rendered."

Relative to the other decision to which you have referred, B-24613, April 7, 1942, 21 Comp. Gen. 909, it is to be noted that while said decision held that in the circumstances therein indicated the furnishing of a receipt establishing delivery of the shipment into the custody of the consignee at destination would not be required, it did not hold, as apparently you consider to be the case in the instant matter, that freight charges to destination are earned upon delivery of the shipment on board the vessel for transportation. In the present instance the property never reached its destination owing, reportedly, to the destruction of the vessel by enemy action.

With respect to the letter addressed to the Administrator of the War Shipping Administration on May 11, 1944, A-24222, the matter there con-

cerned related to proposed traffic regulations pertaining to the transportation of shipments for the United States Government departments and agencies under "War Shiplading 7/1/42" forms, aboard all vessels owned by or under charter to the War Shipping Administration, the use of said forms for ocean shipments during the present emergency having been permitted by this office in a letter addressed to the Administrator on August 31, 1943, A-24222. Since the instant shipment moved under the standard form of Government bill of lading in effect at the time the shipment was made the matter here concerned is controlled by the terms of said bill of lading constituting the contract of affreightment so made. It has been pointed out hereinabove that the terms of the Government bill of lading and the provisions of section 3648 of the Revised Statutes preclude any prepayment of freight. Furthermore, it has been shown that section 3648 of the Revised Statutes precludes, also, the payment of any amount in excess of the value of the service rendered. The sum of $6.10 alleged to be due the United Fruit Company represents charges for transportation from Puerto Limon, Costa Rica, to New York, New York, but the shipment did not reach New York as called for by the contract of affreightment and the charges so claimed were not earned. Therefore, the disallowance of your claim must be, and is sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 38

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, July 21, 1945.

LYKES BROS. STEAMSHIP COMPANY, INCOPORATED,
Galveston, Texas.

GENTLEMEN: Consideration has been given to your request for further consideration of your bill No. Card #53–37 for charges amounting to $12.94, alleged to have accrued on a shipment made March 2, 1942, from San Juan, Puerto Rico, to Soney, Texas, under Government bill of lading No. Cwb–339890, which amount was disallowed by settlement certificate No. 1958981/2, September 17, 1942.

The subject shipment, which is said to have been laden aboard the S. S. *Cardonia,* never reached its destination owing to the alleged destruction of the vessel by enemy action. In substance, it is your contention that notwithstanding the nondelivery of the shipment you are entitled to payment of the full charges to the port of discharge in view of condition 2 of the Government bill of lading which provides that:

> Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

and, by virtue of clause 18 of your usual form of bill of lading which provides, in pertinent part, that:

> * * * Full freight hereunder to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ship and/or cargo lost or not lost. * * *

The contract of affreightment as represented by the Government bill of lading also provided, under condition No. 1, that:

> Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

In this connection there is for noting the statement in paragraph 2 under the caption of "Instructions" on back of the bill of lading, that—

> 2. * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last

carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, in the absence of an express provision to the contrary, under the terms of the Government bill of lading delivery of the shipment was a condition precedent to the right to freight. The contract of affreightment, in effect, embodied the rules and conditions of the carrier's commercial form of bill of lading only to the extent that the said rules and conditions were not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that the provision in your commercial bill of lading requiring payment of the freight charges even though the goods are not transported to destination is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded, etc. Furthermore, the stipulation in your commercial bill of lading that full freight to destination "shall be considered completely earned on receipt of the goods by the carrier" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading "properly accomplished." See in this connection *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by sec-

tion 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances,* 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure* v. *United States,* 19 C. Cls. 173.

Accordingly, the disallowance of the subject claim must be, and is, sustained.

Respectfully,

(Signed) J. C. MCFARLAND,
Acting Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 39

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, August 9, 1945.

WATERMAN STEAMSHIP CORPORATION,
Mobile, Alabama.

GENTLEMEN: Reference is made to your letter of November 15, 1944, and to your bill No. A-66, relative to a claim for $3.75 which was disallowed

by certificate No. T–217259, April 8, 1944. The said amount represents ocean freight charges alleged to have accrued on a shipment of stationery and supplies from New Orleans, Louisiana, to Rio Piedras, Puerto Rico, under Government bill of lading No. A–1270741, April 29, 1942. The property was lost, presumably through the destruction of the S. S. *Afoundria,* on the night of May 5, 1942, while en route on voyage No. 66. The "CERTIFICATE IN LIEU OF LOST BILL OF LADING" filed in support of the claim was endorsed by consignee—"Shipment not received, reported lost at sea." Therefore, as the property did not reach the destination specified in the contract of affreightment, claim was disallowed.

It is your contention as expressed in a letter addressed to the Claims Division of the General Accounting Office on April 21, 1944, that "in accordance with the usual practice full freight charges shall be considered completely earned on the shipment and the carrier is entitled to those charges whether actually paid or not and to retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost." Apparently, this statement was made in reliance upon the provisions in your form of commercial bill of lading in which it is stated, in pertinent part, that "Full freight to port of discharge named herein, and all charges, shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid, or to be collected at destination; and the carrier shall be entitled to all freight and charges due whether actually paid or not, and

to receive and retain them without deduction or refund under all circumstances whatsoever, cargo damaged or undamaged, ship and/or cargo lost or not lost." In your letter of November 15, 1944, you refer to the matter of your bill No. 192 for $3,210.22, which was paid on voucher No. 170123 of the June, 1942, accounts of Captain Stephen J. Brune, Navy disbursing officer, for freight alleged to have accrued on a shipment laden aboard the S. S. *Afoundria* on voyage No. 66, for transportation from New Orleans, Louisiana, to San Juan, Puerto Rico, under Government bill of lading N–893266, April 30, 1942. In the audit of that voucher the payment was found to have been improper and on October 23, 1943, you were requested by the Claims Division of the General Accounting office to remit the full amount paid by the disbursing officer, for the reason that delivery as contemplated by the contract of affreightment had not been effected. On November 4, 1943, in reliance upon the provisions contained in your form of commercial bill of lading, you declined to make the remittance, and on December 11, 1943, you were advised by the Claims Division that "the files in this matter be closed."

The shipment here in question was transported under the terms of a Government bill of lading and the conditions of the contract of carriage as stipulated in the said bill of lading are, in pertinent part, that:

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> 1. Prepayment of charges shall in no case be demanded by carrier, nor shall col-

lection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

The contract of affreightment as represented by the Government bill of lading, in effect, embodies the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent therefore that any provision of the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that "Full Freight * * * shall be considered completely earned on receipt of the goods by the carrier" and that "the carrier shall be entitled to all freight and charges due whether actually paid or not, and to receive and retain them * * * under all circumstances whatsoever * * * ship and/or cargo lost or not lost" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accom-

plished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplates that:

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

There is to be noted, also, the statutory limitation, upon payments to be made under contracts for service, imposed by section 3648 of the Revised Statutes of the United States, which provide, in pertinent part, that:

> No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of any agreement, by keeping the payment within "the value of the service." *McClure* v. *United States,* 19 C. Cls. 173. The provision of the commercial bill of lading to the effect that full freight charges shall be considered completely earned on receipt of the goods and the carrier to be entitled to such charges whether actually paid or not and to retain them under all circumstances whatsoever ship and/or cargo lost or not lost, seems clearly repugnant to the above statutory provision, which

requires that, in the case of a contract for service, payment shall not exceed the value of the service rendered. Concerning the matter of your bill No. 192, it may be stated that credit for the p ment of $3,210.22 has been withheld in the disbursing officer's accounts, and presumably, adjustment with the carrier will be effected by that official.

Accordingly, the disallowance of your claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L YATES,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 40

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, Nov. 24, 1945.

MATSON NAVIGATION COMPANY,
215 Market Street,
San Fransciso 5, California.

GENTLEMEN: There has been considered your request for review of settlement certificate No. 223112½, dated January 31, 1945, which disallowed your bill No. 144 for $326.80, for charges alleged to have accrued on a shipment of 40 crates of springs for double bunks which were laden aboard the S. S. *Makua*—voyage 67–E—at Pier 8, Honolulu, Territory of Hawaii, for delivery to Kahului, Maui, Territory of Hawaii, under Government bill of Lading N–9114–43, dated October 2, 1942.

The record indicates that before sailing the vessel became disabled because of a fire which necessitated unloading the cargo and that, subsequently, the shipment here concerned was transported from Honolulu to Kahului by the Navy, under bill of lading N–9135–43, dated October 9, 1942. Thus, the shipment not having been transported by the Matson Navigation Company the subject claim was disallowed. However, it is your contention that under the terms of your commercial bill of lading which, you state, provides that "freight is earned, ship lost or not lost," the freight charges claimed should be paid, as the shipment was loaded aboard the vessel at Honolulu.

The contract of affreightment is represented by the Government bill of lading in which it is stipulated, in pertinent part, that—

> It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—
>
> "1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accompanied, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.
>
> "2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is to be observed that the contract, in effect, embodies the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that any provision of the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulations usually found in commercial bills of lading with respect to freight being earned, "ship lost or not lost" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplates that:

> * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

There is to be noted, also, the statutory limitation upon payments to be made under contracts for service imposed by section 3648 of the Revised Statutes of the United States, which provides, in pertinent part, that:

> No advance of public money shall be made in any case whatever. And in all

> cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of any agreement, by keeping the payment within "the value of the service." *McClure* v. *United States,* 19 C. Cls. 173. A clause in your commercial bill of lading which provides that "freight is earned, ship lost or not lost" seems clearly repugnant to the above statutory provision, which requires that, in the case of a contract for service, "payment shall not exceed the value of the service rendered."

Accordingly, the disallowance of your claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 41

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, April 11, 1944.

BARBER STEAMSHIP LINES, INC.,
Whitehall Building, 17 Battery Place,
New York, N. Y.

GENTLEMEN: There has been considered your claim, per your bill No. 2-A, for $35,270.63, in

connection with the transportation of steel tanks, 325,000 pounds, 60,034 cubic feet, on the M. S. *Torrens,* under War Department bill of lading No. WQ–3111556.

This shipment was delivered to you at Brooklyn, New York, in November, 1941, "to be forwarded subject to conditions stated on the reverse" of the cited bill of lading "to MANILA, P. I. * * * there to be delivered * * * to COMMANDING OFFICER, PHILLIPINE Q. M. DEPOT." The shipment was not forwarded to Manila and there delivered to such officer but, as shown in the bill of lading space provided for "CONSIGNEE'S CERTIFICATE OF DELIVERY," was delivered to an Army quartermaster at Los Angeles Harbor (Wilmington), California, January 17, 1942. For the transportation from Brooklyn to Los Angeles Harbor you claimed, per your bill No. 2, charges in the amount of $39,763.75 which were computed at rates applicable for transportation from Brooklyn to Manila. Payment in the amount of $4,493.12 was made on voucher 14349 of the May, 1942, accounts of Lieutenant Colonel J. P. Tillman, Army disbursing officer, apparently computed at rates which were applicable for the transportation of tanks from Brooklyn to Los Angeles Harbor. Your claim, per your bill No. 2–A, is for the difference of $35,270.63.

Concerning the delivery at Los Angeles Harbor, rather than at Manila, you state—

> * * * The vessel arrived at Los Angeles Dec. 4, 1941, and the loading of cargo thereat ["the balance of her cargo for intended Far Eastern ports of call"] was completed on Dec. 9, 1941 * * *.

Th ents of Dec. 7, and thereafter are too ll known to call for review here and despite every justification the Master had for an immediate determination to terminate the voyage on Dec. 7 it was not until Dec. 17 that he made the following declaration:

"In view of existing war conditions and the unlikelihood that the situation in the Pacific will improve, it is my considered judgment that to proceed from Los Angeles toward Manila would subject my vessel and cargo now on board her to danger of loss or damage. Accordingly I have decided that the cargo on board my vessel must be discharged at Los Angeles and there delivered to shippers as a complete fulfillment of the conditions of the Bills of Lading. Please so arrange."

In connection with the foregoing you refer to the "following clauses of the regular Line bill of lading," to wit:

Clause 18. All freight prepaid or payable at port of shipment shall be deemed and considered as earned on shipment of the goods or receipt of the goods by the carrier and is to be retained by the carrier, vessel or cargo lost or not lost or in case of frustration or breaking up of the voyage. * * *

Clause 25. In case of war, hostilities * * * blockade * * * warlike or naval operations, conditions or demonstrations * * * whether at or near the port of discharge * * * and whether existing or anticipated before the commencement of or during the voyage, which, in the judgment of the master, is or are likely to give rise to or result in damage

> to or loss of or risk of capture, seizure or detention of * * * the vessel, or any part of the cargo, or may make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge the cargo at the port of discharge * * * the vessel may, at any stage of the voyage, in the discretion of the master, either with or without proceeding further upon the voyage originally contemplated, or with or without proceeding toward * * * any port or other place or point in the course of such voyage to discharge the goods there, remain or stop at * * * any port * * * as the master may consider safe or advisable under the circumstances * * * and may also discharge or transship the cargo * * * there, and thereupon, when so landed, transshipped or discharged, the cargo shall be at the risk and expense (including all expense of transshipment) of the shipper, owner and consignee thereof, and finally delivered hereunder, and the carrier shall be freed and discharged from any further responsibility in respect thereof, and from all liability hereunder; * * * the carrier shall be entitled to a reasonable extra compensation for such services above the full Bill of Lading freight, and the shipper, consignee and cargo shall be liable to the carrier for any charges, freight and extra expense in connection therewith, and the carrier shall have a lien therefor.

You urge in effect that "Clauses Nos. 18 and 25 of the regular line bill of lading" constituted part of the "contract of affreightment" and that, accordingly, although the shipment was transported only to Los Angeles Harbor, you are en-

titled to the freight charges that were applicable for the transportation to Manila called for under bill of lading WQ–3111556.

Concerning "Clause 18" of the "regular Line bill of lading," it is to be noted that under the provisions thereof it was freight "prepaid" or freight "payable" at the "port of shipment" which was to be deemed and considered as "earned" on shipment of the goods or receipt of the goods by the carrier and which was to be "retained" by the carrier, "vessel or cargo lost or not lost or in case of frustration or breaking up of the voyage."

The freight charges were not "prepaid" in the present instance and, if they had been, such action apparently would have been "not only without authority of law, but * * * expressly forbidden by the act of January 31, 1823" (section 3648, Revised Statutes, 31 U. S. C. A. 529), which in part provided "No advance of public money shall be made in any case." See *The Floyd Acceptances,* 7 Wall. (74 U. S.) 666.

Neither were the freight charges for the service here contemplated—transportation from Brooklyn to Manila—"payable at point of shipment." See in this connection Far East Conference Freight Tariff No. 15 which named the rates applicable from Brooklyn to Manila, and provided in rule 2—

> All * * * charges must be prepaid in the United States * * * *except on shipments of Government Cargo.* [Italics supplied.]

See, also, "conditions stated on the reverse" of War Department bill of lading WQ–3111556

and "subject to" which this property was "to be forwarded" by the Barber Steamship Lines, Inc., from Brooklyn to Manila: On "the reverse" of this bill of lading it was provided as follows:

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated."

Bill of lading WQ–3111556 was the "contract of affreightment" in the present matter and the provisions of your "regular Line bill of lading" may be given effect to the extent only that they were not inconsistent with the provisions of bill of lading WQ–3111556 and would not involve violation of law otherwise. In the present matter the indicated situation is that there was no freight "prepaid" at Brooklyn ("port of shipment"), and that there could not have been without involving both a violation of the law and an inconsistency with the conditions of bill of lading WQ–3111556. The further indicated situation is that there was no freight "payable" at Brooklyn ("port of shipment"), and assertions to the contrary would be inconsistent with both the provisions of tariff No. 15 and with the terms

of bill of lading WQ–3111556. And see, also, the further provisions of section 3648 of the Revised Statutes that—

> * * * in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *
>
> This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service," and does not apply when there is a complete performance * * *. *Ezekiel A. McClure* v. *United States*, 19 C. Cls. 173, 181.

The "complete performance" contemplated in the present matter was the transportation of these tanks from Brooklyn to Manila and, in view of what has been noted hereinbefore, it seems apparent that it must have been contemplated by both parties to the "contract of affreightment" (bill of lading WQ–3111556) that it was not until delivery was made or tendered at Manila or, in other words, not until "complete performance" of the contemplated service, that the United States would become liable for, and the Barber Steamship Lines, Inc., would become entitled to, the applicable freight charges for transportation from Brooklyn to Manila, such freight charges being the measure of the "value of the service rendered" when such transportation had been performed in fact. In short, therefore, the record shows a "contract of affreightment" (bill of lading WQ–3111556) which cannot be said to have re-

quired payment by the United States as for transportation from Brooklyn to Manila, or to entitle the Barber Steamship Lines, Inc., to payment as for such transportation, unless and until such transportation was performed in fact. See, in this connection, *Clifford* v. *Merritt-Chapman & Scott Corporation*, 57 F. 2d 1021, 1024, and *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F. 2d 740, 742, certiorari denied, 273 U. S. 717.

And further concerning bill of lading WQ-3111556, having always in mind section 3648 of the Revised Statutes, see *International Paper Company* v. *The Schooner "Gracie D. Chambers," &c.*, 248 U. S. 387—

> * * * In those cases ["Nos. 449 and 450"] [*"Allanwilde Transport Corporation* v. *Vacuum Oil Co.*, ante, 377"] we decided that the bill of lading expressed the contract of the parties and hence determined their rights and liabilities. And it is the safer reliance, the accommodation of all the circumstances that induced it. It was for the parties to consider them, and to accept their estimate is not to do injustice but accord to each the due of the law determined by their own judgment and convention, which represented, we may suppose, what there was of advantage or disadvantage as well in the rates as in the risks.

See, also *Linea Sud-Americana, Inc.* v. *7,295.40 Tons of Linseed*, 108 F. 2d 755, certiorari denied, 309 U. S. 672; *Gamboa, Rodriguez, Riviera & Co., Inc.* v. *Imperial Sugar Co.*, 125 F. 2d 970, certiorari denied, 316 U. S. 691.

It must be concluded therefore, that payment on the basis urged by you would not be author-

ized and, accordingly, your claim, per your bill No. 2–A, may not be certified for allowance.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 42

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, Aug. 31, 1943.

Administrator, War Shipping Administration:

MY DEAR ADMIRAL LAND: There has been received your letter of July 3, 1943, requesting the consideration of this office with respect to the use on all ocean shipments of Government cargo of the uniform bill of lading known as "War Shiplading 7/1/42," as prescribed in General Order No. 16, issued by the War Shipping Administration July 4, 1942, and further requesting that the procedure and forms of Government bills of lading as prescribed in General Regulations No. 97, issued by this office April 13, 1943, be considered as not applicable to ocean or deep-water shipments of Government property.

It can be appreciated that the use of the above-mentioned special bill of lading would bring about uniformity and possibly simplify administrative procedure, since it is understood that the bill of lading on all ocean shipments is prepared at the port of embarkation by the agent of the steamship company who requires that all privately-owned property be shipped on the "War

Shiplading 7/1/42." It is also understood that, with respect to shipment of Government property, all of the Government agencies are requiring the use of the preposed Government bill of lading form whereas certain others, particularly subsidiary corporations of the Reconstruction Finance Corporation, use the "War Shiplading 7/1/42," resulting in a further lack of uniformity.

In view of the fact that ocean shipments are of a special class controlled by the War Shipping Administration, as the carrier, with the several peace-time steamship companies acting as agents therefor, and in order to accomplish the desired uniformity, this office will not object to the use of the "War Shiplading 7/1/42" form for the duration of the present emergency, on ocean shipments of Government property, imports or exports, by all Government agencies, in lieu of the U. S. Government Bill of Lading, Standard Form No. 1103, as prescribed in General Regulation No. 97. However, in billing the Government agencies for the charges for such ocean shipments, it will be necessary that the War Shipping Administration, as carrier, use the Public Voucher for Transportation, Standard Form No. 1113, attaching thereto the original of the "War Shiplading 7/1/42" form in support of the said voucher and follow the procedure for the billing of freight transportation charges prescribed in the above-cited general regulations.

It should be understood that the term "ocean shipments" as herein used does not include coastwise shipments, which come within the class of interstate commerce, and furthermore, that shipments of Government property from within the

United States to oversea destinations must move on the standard Government bill of lading form to the port of embarkation, and thence to the oversea destination on the "War Shiplading 7/1/42" form. Likewise, imports must move from the port of debarkation to the destination within the United States on the standard Government bill of lading form.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 43

COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, May 11, 1944.

Administrator, War Shipping Administration:

MY DEAR ADMIRAL LAND: There has been received your letter dated March 9, 1944, reference W. J. T., transmitting draft of proposed Traffic Regulation No. 7–A–Operations Regulation No. 44–A, pertaining to all vessels owned by or under charter to the War Shipping Administration and covering transportation services provided for United States Government departments and agencies on such vessels. The approval of this office is requested to the procedure in the proposed regulations, particularly the following points:

1. That the accomplishment of the War Shiplading by the receiver of the goods is not necessary as a condition to the collection of the freight charges.

2. That the transportation voucher, Standard Form No. 1068 or Standard Form No. 1113, be supported by a freight bill and a certified copy of the on-board bill of lading.

3. That Government agencies, other than those for which cargo is carried free, shall guarantee to the War Shipping Administration the payment of transportation charges on inward shipments.

4. That claims for loss or damage to cargo shall be handled in accordance with prescribed interdepartmental claims agreements and the amount of such claims shall not be deducted from freight charges.

In prescribing the use of the War Shiplading 7/1/42 for ocean shipments by office letter of August 31, 1943, A–24222, full consideration was given to the commercial international maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on lading, ship or cargo lost or not lost. It was understood that such practice necessitated the inclusion of the following wording in paragraph 15 of the terms of the War Shiplading:

> Full freight shall be paid on damaged or unsound goods. Full freight hereunder to post of discharge named herein shall be considered completely earned on shipment whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo

lost or not lost or the voyage broken up or abandoned.

Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed, on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers, generally, cover the transportation charges by insurance and as it has been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from the uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions.

With respect to the billing of the transportation charges, it is desirable that Standard Form No. 1113 be used exclusively since the old transportation voucher, Standard Form No. 1068, is now reserved for use only in the billing of the old Government bill of lading, Standard Form No. 1058, which will be discontinued by all departments after June 30, 1944. In support of the transportation charges as billed in Standard Form No. 1113, there should be attached the original of the freight bill and a certified copy of on-board bill of lading **(War Shiplading 7/1/42).** It will be necessary, however, that the copy of the

on-board bill of lading be certified by typing or otherwise applying the following wording to which the designated employee of the steamship company acting as agent for the War Shipping Administration shall affix his autographic signature:

> I certify that this document is a true and correct copy of the original on-board War Shiplading under which the goods herein described were loaded on the above-named vessel and that the original and all other copies thereof have been clearly marked as not to be certified for billing.
>
> ---
>
> *Agent for War Shipping Administration.*

At the time the one copy is so certified, it will be necessary that all other copies and the original of the same War Shiplading be marked with the notation "This document must not be certified for billing since one other copy has already been so certified", in order to provide an additional safeguard against duplicate payments due to the erroneous certification of another copy of the same bill of lading. It is understood that there will be maintained in the departments to be billed and the War Shipping Administration further controls, to prevent duplicate payments, based particularly on the name of the vessel and the voyage number.

In view of the adoption of the above procedures and the provisions of section 207 of the Merchant Marine Act 1936, as amended, this office will interpose no objection to Government agencies, other than those for which cargo is carried free, guaranteeing to the War Shipping Administration the payment of transportation charges on such inward shipments as are determined to be properly chargeable to an appropriation of the particular agency. Furthermore, it can be appreciated that large amounts of revenue necessary for operation may be tied up pending determination of claims for loss or damage to cargo and this office will not require that such claims be collected by deductions from freight charges.

Subject to the above-requested changes and comments, the proposed Traffic Regulation 7–A—Operations Regulation 44–A, relating to cargoes of Government agencies transported on War Shipping Administration ships, are approved for the duration of the present emergency and for such time thereafter as this office may determine the need exists for specific procedures in connection with ocean shipments.

It is requested that when published two copies of the regulations be furnished this office.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 44

COMPTROLLER GENERAL OF
THE UNITED STATES,
Washington 25, Oct. 12, 1944.

BARBER STEAMSHIP LINES, INC.,
Whitehall Building, 17 Battery Place,
New York 4, N. Y.

GENTLEMEN: There has been received letter of your Vice-President, dated September 20, 1944, referring to office letter of May 11, 1944, A-24222, which was reproduced and circulated by the War Shipping Administration as Appendix "A" To Traffic Regulation No. 7-A, Operations Regulation No. 44-A of the War Shipping Administration, dated August 30, 1944. The letter of your Vice-President is in part as follows:

> While your letter pertains to "all vessels owned by or under charter to War Shipping Administration and covering transportation services provided for United States Government Departments and Agencies on such vessels", we assume—but would thank you for your confirmation—your remarks would have equal application to transportation services provided for United States Government Departments and Agencies on vessels other than those owned by or under charter to War Shipping Administration.
>
> If you confirm the correctness of our supposition, may we understand that the bill of lading form of the Line or Vessel involved in a given transport will be acceptable to you in place of the Government Bill of Lading Form heretofore used to

cover the transportation of cargo tendered for shipment by United States Government Departments and Agencies; also, that said Line or Vessel bill of lading need not be accomplished as a pre-requisite to the payment of applicable ocean freight charges, etc.

It is presumed that you have reference to foreign vessels and in particular the Norwegian vessels for which it is understood your line acts as agents, and since it was stated in office letter of May 11, 1944, A-24222, that there appears to be no reason why the United States Government should deviate from the uniform maritime practice of long standing in the payment of freight charges, you are advised that the assumption stated in the first paragraph quoted above is correct. Accordingly, the departments and agencies of the Government are authorized to make payment of ocean transportation charges to ship lines under the same procedure as heretofore approved for payments to the War Shipping Administration as agent for the ship lines of the United States, provided that such services were contracted for under similar terms and conditions.

With respect to the form of bill of lading, it will be expected that wherever practicable the Warshiplading approved for the War Shipping Administration will be used, or a form incorporating the same terms and conditions, and in the interest of uniformity the billing thereof should be, if possible, on Standard Form No. 1113, supported by the original of the freight bill and a certified copy of the on-board bill of lading. Such copy of the on-board bill of lading

must bear the same certificate prescribed by this office for the copy of the on-board Warshiplading and the other copies marked as likewise prescribed. Accordingly, it may be understood that the accomplishment of the ship company or vessel bill of lading by the receiver of the goods is not a prerequisite to the payment of the applicable ocean freight charges, provided that such ocean bill of lading is otherwise correct and in accordance with the conditions and procedure herein prescribed.

It should be noted, however, that Traffic Regulation No. 7–A, Operations Regulation No. 44–A of the War Shipping Administration and the Warshiplading form of ocean bill of lading were approved in office letter of May 11, 1944, for the duration of the present emergency and for such time thereafter as this office may determine the need exists for specific procedures in connection with ocean shipments, and you are advised that this same condition of approval must apply to the procedure herein approved for ocean bills of lading other than the Warshiplading.

Respectfully,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

ENCLOSURE NO. 45

BARBER STEAMSHIP LINES, INC.,
New York 4, N. Y., October 31, 1944.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D. C.

S. S. *Siranger*—Voyage No. 5–A transportation vouchers—ocean freight cargo shipped under Government form of bill

of lading vessel lost by enemy action while enroute to bill of lading destination.

SIR: We attach the following:

1. Photostat of letter of United States Maritime Commission, Washington, D. C., dated August 19th, 1944, rejecting invoices for ocean freight charges in the amounts of $241.50, $270.20 and $272.90, on the ground that delivery of goods to consignee is a condition precedent to demand for payment of freight.

2. Photostat of our letter to United States Maritime Commission, dated August 30th, 1944, excepting to rejection of ocean transportation invoices by United States Maritime Commission.

3. Photostat of our letter to United States Maritime Commission, dated September 11th, 1944, stating further exceptions to the rejection of invoices hereinabove referred to.

4. Photostat of letter of War Shipping Administration, Washington, D. C., dated October 4th, 1944 (evidently written on behalf of United States Maritime Commission) reiterating denial of responsibility for payment of ocean freight charges, indicating a privilege to appeal to you from said decision.

The attachments serve, we think, to fully describe the position and we respectfully request they be reviewed by your goodself and that you authorize the acceptance of our vouchers as representing proper charges against the United States Maritime Commission, as Shipper.

Yours very truly,

BARBER STEAMSHIP LINES, INC.,
JAS. B. YOUNG, *Vice President.*

862191—49——13

Refer to C–3

UNITED STATES MARITIME COMMISSION,
Washington, August 19, 1944.

BARBER STEAMSHIP LINES, INC.,
17 Battery Place, New York 4, N. Y.

Subject: Transportation Vouchers—Ocean Freight—S. S. *Siranger.*

GENTLEMEN: Your public voucher forms submitted for payment in the amounts of $241.50, $270.20, and $272.90, covering ocean freight transportation on shipments of operating equipment from New York to Lagos, Nigeria and Takoradi on the S. S. *Siranger,* are returned herewith.

In accordance with an opinion by our Legal Division, payment of freight in this instance, under the terms of the Government bill of lading and the Comptroller General's decision, is not authorized. The Government form bill of lading by clause 1 expressly provides that delivery of the goods to the consignee is a condition precedent to payment of freight, and by clause 2 incorporates a provision contained in another document to the effect that freight is irrevocably earned on shipment, ship or cargo lost or not lost. Since the two clauses are directly contradictory, the rule of construction is that the specific clause contained within the four corners of the contract will prevail over a clause, where, in order to determine

its provisions, reference dehors the contract must be made.

Accordingly, we are unable to process the subject vouchers for payment.

Very truly yours,

A. C. WALLER,
General Auditor.

Attachments (3).

AUGUST 30, 1944.

United States Maritime Commission, Washington, D. C.:

Att: Mr. A. C. Waller, *General Auditor.*

Transportation Vouchers—Ocean Freight S. S. *Siranger*—Your Ref. C-3.

DEAR SIRS: We acknowledge receipt of your letter of the 19th instant and regret to note therefrom you do not consider yourselves liable for the payment of the freight charges therein stated and that you consider Clause I of the Government form of Bill of Lading supersedes the conditions of the Line Bill of Lading which, we assert, were definitely incorporated in the Government form of Bill of Lading by reference.

We do not find ourselves in agreement with your conclusion.

It is quite inconceivable to us that any Governmental Department shipping cargo under the Government form of Bill of Lading, should, by reason of the Carrier being required by law to

abstain from demanding prepayment of freight, as is the case with all commercial shippers, consider that privilege formulates a proper basis for declining to pay said freight when circumstances attending the voyage render impossible the delivery of the cargo at the intended destination.

Quite apart from the above, we should like to point out that each of the bills of lading here concerned bear a special rubber stamp clause reading as follows:

> Subject to all the terms, conditions and exceptions of the Line's regular form of bill of lading, and where any conflict occurs between this form and the Line form the latter's terms, conditions and exceptions are to govern.

We submit that the special clause, which we assume you did not have knowledge of as of the time you wrote your letter under reply, constitutes a contractual agreement on your part that the terms and conditions of the Line Bill of Lading supersede those of the Government form of Bill of Lading.

We request your further consideration in the light of the statements herein made and, meanwhile, we reserve all rights the S. S. *Siranger* and/or her Owners may have in the premises.

Yours truly,

BARBER STEAMSHIP LINES, INC.,

Vice President.

SEPTEMBER 11, 1944.

United States Maritime Commission,
Washington, D. C.:

Atten: Mr. A. C. Waller, *General Auditor.*

Transportation Vouchers—Ocean Freight
S. S. *Siranger*—Your Ref. C-3.

DEAR SIRS: Please be referred to our letter of the 30th ultimo reply to which is now awaited.

Meanwhile, we assume you are familiar with Traffic Regulation No. 7-A and Operations Regulation No. 44-A, joint issue, of War Shipping Administration, dated August 30th, 1944, which has as Appendix "A" a letter of the Honorable Lindsay Warren, Comptroller General of the United States, dated May 11th, 1944, wherein, among other things, the Comptroller General says:

> In prescribing the use of the War Shiplading 7/1/42 for ocean shipments by office letter of August 31, 1943, A-24,222, full consideration was given to the commercial international maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost. It was understood that such practice necessitated the inclusion of the following wording in paragraph 15 of the term of the War Shiplading:
>
> "Full freight shall be paid on damaged or unsound goods. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be stated or in-

tended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up or abandoned."

Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers, generally, cover the transportation charges by insurance and as it has been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from the uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions.

While the quotation makes reference to War Shiplading 7/1/42 in use as to vessels owned by or under charter to the War Shipping Administration, the conclusions stated as to it would appear to unquestionably have application to other forms of bills of lading containing a similar clause or one in language of the same effect in that it is hardly likely one set of rules would apply to cargo shipped in vessels owned by or

under charter to War Shipping Administration and another to vessels not so owned or chartered, when the contractual conditions are similar.

We think it of particular importance and interest that the Comptroller General of the United States recognizes the propriety of the provision universally employed in the bills of lading to the effect the "transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost" and, further, "that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading". The latter is further amplified by the Comptroller's reasoning that "the payment of freight charges does not constitute payment in advance of services rendered since the accomplishment of an on-board certificate in the bill of lading is acceptable as prima facie evidence the cargo was loaded and freight charges earned".

The above is offered as in further support of our contention that the withholding of freight moneys from S. S. *Siranger* for the reason cargo concerned was not physically delivered at bill of lading destinations is improper in that it is neither in accord with the conditions of the contract of affreightment under which cargo is accepted for shipment nor the commercial international maritime agreement of long standing that said charges are earned and payable on loading, ship or cargo lost or not lost.

Quite apart from the above, we maintain the position stated in our letter of August 30th, i. e. that the terms and conditions of the Line bill of

lading supersede anything in conflict therewith which may appear in the printed condition of the Government bill of lading, by reason of special clause to that effect which was pressed upon the Government bills of lading here involved.

We would thank you to write us at your earliest convenience.

Yours very truly,

BARBER STEAMSHIP LINES, INC.,

Vice President.

WAR SHIPPING ADMINISTRATION,
Washington 25, D. C., October 4, 1944.

BARBER STEAMSHIP LINES, INC.,
Whitehall Building, 17 Battery Place,
New York 4, N. Y.

Subject: Transportation Vouchers—Ocean Freight S. S. *Siranger.*

GENTLEMEN: Reference is made to our letter of September 21, 1944, and your reply thereto of September 25, and previous exchange of correspondence concerning ocean freight transportation on shipments of operating equipment from New York to Lagos and Takoradi.

As informed you, we submitted copies of your letters of August 30 and September 11, to our Legal Division for further review and decision, and we are now in receipt of advice to the effect that the information conveyed to you in our letter of August 19, is controlling. However, you have the liberty, of course, to submit the question to the Comptroller General of the United States for a decision.

In order that you may be thoroughly familiar with the position of our General Counsel with respect to this subject we quote herewith the following:

> Barber Lines' letter of September 11 quotes at Length the Comptroller General's letter of May 11. A copy of the Comptroller General's letter in question is attached to Traffic Regulation 7–A—Operations Regulation 44–A. That letter does contain considerable language which seems to favor the carrier's right to retain freight after the cargo is loaded even though the vessel or cargo may thereafter be lost. That language involved a situation where WARSHIPLADING only would be used and there would not be any clause involved such as Clause 1 of the Government Form Bill of Lading. That letter therefore could not be taken to mean that the Comptroller General would no longer adhere to the opinion reported in 21 DCG 909 which involved a shipment under a Government Bill of Lading incorporating a carrier's regular form bill of lading.

Barber Lines' letter of August 30 points out that in the present case the Government Bill of Lading in addition to the regular printed incorporating clause (Clause 2) contained the following stamped provision.

> Subject to all the terms, conditions and exceptions of the Line's regular form of bill of lading, and where any conflict occurs between this form and the Line's form the latter's terms, conditions and exceptions are to govern.

If that stamped clause is valid and would be given effect, the conclusion stated in our memorandum of August 9 would be correct. However, I question whether the Comptroller General would permit the use of or give effect to such a stamped provision. Nowhere in the Comptroller General's Regulations is any authority given to change any terms of the contract or add new terms or to make any notations except of course such matters as the name of the ship, the name of the shipper, description of the goods, etc. Section 8 which prescribes such matters as the size, color of the paper and other details of the Government Form Bill of Lading, provides that "no departure from the exact specifications of the standard bill of lading forms herein approved will be permitted, * * *." Obviously a provision of the contract is of considerable more importance than such matters of form as the size of the bill of lading. Moreover, a further provision in respect to the form of transportation vouchers provides that "* * * in reproducing the said voucher forms outside the Government Printing Office the exact size, wording, and arrangement as approved by the Comptroller General of the United States must be adhered to. * * *" Accordingly, I question whether the stamped clause is valid.

We suggest that in the event you are not in accordance with the findings as indicated, that you accordingly present your case to the Comptroller General of the United States.

Very truly yours,

V. T. HARFORD,
Assistant General Auditor,
Voyage Accounts.

ENCLOSURE NO. 46

Circular No. 7

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF TRANSPORTATION,
Washington, D. C., January 22, 1943

Prepayment of Ocean Freight on Ships of Foreign Registry.—1. The following instructions from the Commanding General, Services of Supply to the Chief of Transportation dated January 9, 1943 are published for the information and guidance of all concerned:

> 1. Pursuant to authority contained in Executive Order 9001 and to the delegation of authority contained in instrument dated September 15, 1942 from the Under Secretary of War to the Commanding General, Services of Supply, it is hereby directed that notwithstanding provisions to the contrary contained in Government bills of lading, ocean freight charges on cargoes to overseas destinations carried in vessels of foreign registry, not chartered by, controlled by, nor operated by the War Shipping Administration, shall be due and payable after the completion of the loading of the cargo on board the vessel for shipment to the consignee.
>
> 2. The above action is predicated upon a finding by me that under the circumstances involved, this procedure is necessary to and will facilitate the successful prosecution of the war effort.

2. Transportation Officers when called upon to handle overseas shipments of the above character will observe the foregoing by causing the follow-

ing entry to be placed on Government bills of lading relating to the above cargoes:

> The ocean freight charges hereon stated are now ~~due~~ and payable, cargo being aboard vessel for shipment to consignee, and necessity for prepayment having been determined by Commanding General, Services of Supply acting under Executive Order 9001 as necessary to and will facilitate the successful prosecution of the war effort.

3. To expediate the prepayment of ocean freight charges, the bills of lading prepared as above will be presented to the nearest Finance Officer, U. S. Army for settlement. The Chief of Finance advises the disbursing officers concerned have been informed of the procedure directed herein.

4. The correct project number to be used to cover the above charges is "466—Commercial Transportation by Water".

C. P. GROSS,
Major General, Chief of Transportation.

Official:

CLIFFORD STARR,
Lt. Colonel, Transportation Corps,
Chief, Administrative Division.

U. S. GOVERNMENT PRINTING OFFICE: 1948